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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 635

CAMILO WESTON LEYRA,

Petitioner,

vs.

WILFRED L. DENNO, WARDEN OF SING SING PRISON, OSSINING, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals is reported in 208 F. 2d 605. The opinion of Judge Ryan denying the application for a writ of *habeas corpus* appears at 113 F. Supp. 556. The opinions of the Court of Appeals of the State of New York are reported in 302 N. Y. 353 and 304 N. Y. 468 under the name, *People* v. *Leyra.*

Jurisdiction

The Judgment of the Court of Appeals was entered on November 24, 1953. A timely application for rehearing was made and was denied on December 15, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Statute Involved

28 U. S. Code 2254. "State Custody; remedies in State courts

An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Summary Statement

Petitioner challenges his conviction in the courts of New York of murder in the first degree of his father on the ground that the receipt of certain confessions in evidence violated his right to due process.

Petitioner was charged with the murder of both his parents (17, 18).* After the discovery of their bodies he came under suspicion and was questioned by the police for several days (576-659; 923-925). A police officer (769), Cap-

* The references are to folios in the record in the State Court of Appeals.

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tain Meenahan, introduced a psychiatrist, Dr. Max Helfand, to petitioner on the pretext that he was going to treat a sinus condition of which petitioner had complained (925). The doctor had been called in by the District Attorney (768). The doctor and the suspect were then left alone—but the room in which they remained was wired and their conversation overheard by the District Attorney, Captain Meenahan, and others and was recorded (982-985).

The doctor made frequent statements that he was trying to help petitioner and suggested that petitioner should tell the whole story. While petitioner made various admissions to the doctor (1679-1809) he did not tell him everything—indeed, it is doubtful if what he told to the doctor could have sustained a conviction.

After they had been together for about an hour and a half petitioner suggested that he talk again to the police captain (1809). The latter, overhearing this on the wire, came into the room. After a brief exchange between the doctor and the captain, the latter took the former's place (929). Indeed, for a moment petitioner confused the police captain for the doctor (2016, 17). And, after the doctor had left, the conversations continued, resulting in a full statement by petitioner which implicated him in the two killings (930-957). This statement formed an important basis for the jury's conclusion that the killing of the father had been premeditated.

During the same evening a more formal confession was obtained by two representatives of the district attorney's office (1202-1251). They testified that petitioner's demeanor at the time was "normal" (1326) and calm (1400). In between petitioner had seen a business associate, Herrschaft, and told him, but without any amplification whatever, that "I did it" (1048). "I guess I just blew my top" (1049).

At petitioner's first trial all these statements were admitted in evidence by the Trial Court. The New York Court of Appeals (302 N. Y. 353) reversed the conviction then obtained on the ground that Dr. Helfand had practiced "mental coercion" so that the statements made to him were inadmissible. The Court held that the impact of this coercion on the other statements should be considered by the jury at any later trial. The Court considered also the contention made by the defense that the doctor had obtained admissions from petitioner by a promise of leniency and held that the jury "should have been instructed to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor" (302 N. Y. at 366).

At the second trial the statement made to Dr. Helfand was excluded from consideration by the jury on the subject of petitioner's guilt. But, nevertheless, the Trial Court permitted this statement to be introduced in evidence for the purpose of determining whether all of the details contained in the subsequent confessions were suggested and instilled in Leyra's mind by the unusual technique used by the psychiatrist, Dr. Helfand.

The Trial Court charged that Dr. Helfand, acting for the District Attorney, had made a promise to petitioner "in order to induce him to confess" that he would not be prosecuted for first degree murder (2679). But, over objection by the defense, the Trial Court let the jury consider the statements to Meenahan, Herrschaft and the assistant prosecutors.

The Court charged, however, that there was a presumption that both the coercion and the inducement had carried over to these statements. And, moreover, that the prosecution must establish the contrary "beyond a reasonable doubt" (2681-85).

Petitioner was convicted at this second trial of murder

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in the first degree of his father and murder in the second degree of his mother. Under New York practice the first degree conviction was appealed directly to the New York Court of Appeals. There petitioner contended that his federally guaranteed constitutional right to due process was denied by the receipt in evidence of the various statements to Meenahan and the others. (See 304 N. Y. 844)

On the second appeal the state Court of Appeals divided (304 N. Y. 468). The majority merely took the position that the case had been properly tried in accordance with the rules laid down on the first appeal. There was no discussion of the contention that the challenged statements should have been excluded as matter of law, no attempt to evaluate any evidence which justified submission of the issues to the jury.

The minority, Judge Fuld and the late Chief Judge, Loughran, expressed the view (304 N. Y. at 473) that there was no basis for any finding that the confessions to Meenahan and the assistant prosecutors were free from the taint of the inducement.

An application was then made to this Court for a writ of certiorari which was denied, Justices Black and Douglas dissenting (345 U. S. 918, id. 946).

Thereupon the instant petition for *habeas corpus* was filed in the United States District Court for the Southern District of New York. Judge Ryan, after holding a hearing at which the record of the second trial was placed before him, found (113 F. Supp. 556) that petitioner had exhausted his state remedies and that the Court had jurisdiction but denied the application. Nevertheless he certified that probable cause existed for an appeal.

Judge Ryan expressed the view that the state courts had properly decided the constitutional issue. But he noted no considerations which might have justified his conclusion that "the facts are not irreconcilable with a finding by a

jury that the subsequent statements of petitioner were voluntary."

In the United States Court of Appeals (208 F. 2d 605) the majority, disregarding the admonitions of the state Court of Appeals that the issues of coercion and inducement must be considered "separately" (302 N. Y. at 366; 304 N. Y. at 471), treated them as one. They found a basis for submitting these matters to the jury in the circumstance that the doctors called to testify as experts on the impact of the original coercion and inducement had differed—ignoring the New York law that such expert conflict alone does not justify such submission (*Strasberg* v. *Equitable Life Assurance Company*, 281 App. Div. 9, 13).

But essentially the majority below rested their decision on a disregard of the Trial Court's charge that Dr. Helfand had induced petitioner to confess by a promise of leniency and a conclusion that the evidence did not justify that charge. No such contention had ever been made by the prosecutor at any stage of this case. On the contrary, in briefs filed in the New York Court of Appeals, this Court, the District Court and the United States Court of Appeals, his position had consistently been that Dr. Helfand's promise of leniency would have bound him not to seek a first degree conviction but for the fact that, at the first trial, petitioner had claimed he had been hypnotized by the doctor.

Judge Frank, in his dissenting opinion (208 F. 2d at 611), expressed the view that there was no testimony justifying an inference that the inducement had worn off. He analyzed the testimony of the state's expert and showed that he had in fact not expressed any opinion that it had worn off.

No opinion was written by the Court below when it denied the motion for rehearing.

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Questions Presented

1. Whether the receipt in evidence of the statements made by petitioner to Captain Meenahan violated his right to due process as a matter of law because tainted by the coercion practiced upon him by Dr. Helfand.

2. Whether the receipt in evidence of the statement made by petitioner to Captain Meenahan violated his right to due process as a matter of law because induced by the promise of leniency made by Dr. Helfand.

3. Whether the receipt in evidence of the statements made by petitioner to the Assistant District Attorneys violated his right to due process as a matter of law because tainted by the coercion practiced upon him by Dr. Helfand.

4. Whether the receipt in evidence of the statements made by petitioner to the Assistant District Attorneys violated his right to due process as a matter of law because induced by the promise of leniency made by Dr. Helfand.

5. Whether the decision by the United States Court of Appeals for the Second Circuit on a ground never before advanced by the state courts or state officials violated petitioner's right of due process and his right to counsel.

Summary of Argument

1. The state courts violated petitioner's constitutional right to due process in submitting to the jury the question whether the inducement which the Trial Court charged, as matter of law, had been made by Dr. Helfand had carried over to the statements made to Captain Meenahan and the assistant prosecutors. In the first place there was no basis in fact for separating the statements made to Meenahan from those made to Helfand. In the second place there was no evidence that the inducement had ever been withdrawn and absent such evidence there was nothing to submit to the jury. The Court of Appeals for the Second Circuit

erred in ruling that the doctors had created a conflict of testimony, both because there was in fact none and because, under New York law, conflict of experts alone creates no issue of fact. Finally, the Court below erred in ignoring the state rulings and the contentions of the prosecution and deciding for itself that there had in fact been no inducement.

2. The state courts violated petitioner's constitutional right to due process in submitting to the jury the question whether the coercion had carried over because there was no basis for separating the statements made to Meenahan from those made to Helfand, which were concededly tainted, and because the time which elapsed before the confessions were made to the assistant prosecutors was too short to permit an inference, absent any affirmative evidence, that the impact of the taint had been removed. The Court of Appeals for the Second Circuit erred in ruling that the doctors had created a conflict of testimony since, under New York law, conflict of experts alone creates no issue of fact.

3. The Court of Appeals for the Second Circuit erred in its treatemnt of the issues presented by disregarding prior state rulings in this case and ignoring applicable state law. Thus, that Court blended the issues of coercion and inducement, although the state Court of Appeals had twice indicated that they must be considered separately. The Court below rejected the Trial Court's ruling that there had been inducement and improperly usurped the function of the jury by deciding that there had been none. The Court below ignored the state rule that expert testimony alone cannot create an issue for submission to the jury.

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Argument

Point I

PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED BY LETTING THE JURY PASS ON THE ISSUE OF THE CONTINUATION OF THE IMPACT OF THE INDUCEMENT.

On the first appeal to the state Court of Appeals it was incidentally recognized that there was an issue of inducement. The Court stated that the jury should have been instructed on that issue separately, but it gave no consideration to the evidence either of the existence of the inducement or of its impact on the later statements (See 302 N. Y. at 366). At the close of the second trial the Court charged, as a matter of law, that there had been a promise that petitioner, if he confessed, would not be prosecuted for first degree murder (2679), that there was a presumption that this would carry over to the statements made to Meenahan and the others and that the prosecution had the burden of establishing the contrary beyond a reasonable doubt (2681-85).

On the second appeal (304 N. Y. 468) the state Court gave no consideration whatever to the state of the evidence or the contention that the issue should not have been left to the jury. Nor did the District Court do so in dismissing the writ of *habeas corpus* (113 F. Supp. 556).

Petitioner contends that the only evidence which could affect the impact of the inducement would have been a statement by someone that it had been withdrawn—and no claim has ever been made that such a statement had been made. The only contention ever made by the prosecution was that petitioner was not entitled to rely on this inducement because he had not testified that he had so relied, but, at his first trial, had claimed that Dr. Helfand had hypnotized him. As respondent's counsel said in his brief in the Court below (p. 32):

> "* * * We concede here, as we conceded in the Court of Appeals, that if appellant had admitted the fact of his confessions and had contended that he was induced to make them by the promise of immunity, that promise would have bound the district attorney to prosecute him for manslaughter only."

But that view of the case flies in the face of this Court's warning that "inconsistent" testimony by a defendant cannot permit use of a confession when the established facts show it to have been improperly obtained. That was decided in *Lee* v. *Mississippi*, 332 U. S. 742, 745, where defendant denied that he had ever made the statements attributed to him. That, in effect, is what petitioner did here when he claimed that he didn't know what he had said because he had been hypnotized. Since the jury rejected that contention, as in the *Lee* case it rejected the denial, all that remains is the inducement. Besides, the state's contention proves too much, for if in any respects valid, it would permit use of the statements made to Dr. Helfand—and no Court has so held.

This Court has made it clear that the due process clause bars any confession obtained by inducement, as well as by coercion. In *Lisenba* v. *California*, 314 U. S. 219, Mr. Justice Roberts, after enumerating various grounds for setting aside a state conviction, specifically including physical torture, added (p. 237):

> "The concept of due process would void a trial in which, by threats *or promises* in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence." (Emphasis ours.)

Mr. Justice Jackson recognized this identity in his separate opinion in *Watts* v. *Indiana*, 338 U. S. 49, where he said at page 60:

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> "Such treatment [referring to force] not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, *promises or inducements* * * *." (Emphasis ours.)

Before discussing the rationale of the Court below on the subject of inducement, we wish to point out that it is improper to make any distinction between Dr. Helfand and Captain Meenahan and treat the statements made to them as separate. For there was here but a single occurrence. The conversations with the doctor were but an interlude in the questioning by Captain Meenahan, an interlude without break either in time or character. For it was Meenahan who introduced petitioner to Dr. Helfand (769, 927) and returned even before the doctor had finished (929, 1809-1811). The doctor told Meenahan to take his seat (1810) and without interruption of any kind Meenahan picked up where the doctor had left off (930). Indeed, petitioner even addressed Meenahan, for a moment, as "Doc" (2016, 2017—see 2211 at first trial, Exh. D1, C3 in evidence at second).

This becomes all the more evident when it is noted that petitioner did not actually confess to the doctor, but first confessed to Meenahan after his talk with the doctor—that is, after the inducement which the doctor had made. There is, therefore, here, no room for the application of any principle of carryover under *Lyons* v. *Oklahoma*, 322 U. S. 596, no possible basis for submission to the jury. Whatever may be said of the statements to the assistant prosecutors, those to Meenahan should have been excluded because they were the direct and immediate fruit of the inducement.

1. The Court below made no real attempt to deal with this issue, but sought to avoid it, largely by tying the inducement and coercion aspects of the case together, saying there was no basis "for the sharp dichotomy between

threats and promises at the basis of petitioner's appeal." (208 F. 2d 610) Petitioner treated the two aspects of the case separately because that is the way they had been treated by the State Court of Appeals which twice said that the issues must be treated separately (302 N. Y. at 366; 304 N. Y. at 471). We do not see how a federal court can disregard these rulings.

2. In upholding the submission of the issues to the jury the Court below relied in part on petitioner's failure to complain to Herrschaft of improper treatment by the doctor, in part on the testimony of the assistant district attorneys that he was calm when he talked with them. (208 F. 2d at 608) Neither of these points has any bearing whatever on the issue of inducement. And even on that of coercion, no adverse inferences are possible.

Suppose we had here the ordinary kind of coercion, beatings or threats thereof. The failure of an accused to complain of such treatment might cast doubt on its having taken place, but no one could suggest that failure to complain of a beating whose occurrence could not be doubted would have any bearing on the impact of that beating on future confessions. So here, where the coercion was of a subtle kind, and the facts are not in dispute since everything said was recorded, it is wholly improper to draw any inferences from petitioner's not having complained to Herrschaft. Moreover, this failure could have no relation back to the earlier Meenahan confession. Finally the readiness to confess confirms the inducement—it can, by no stretch of the imagination, be used to reject it.

So, that petitioner appeared normal to the assistant prosecutors corroborates the claim of inducement, showing that he was calmed by the assurance that he would not be prosecuted for first degree murder. It can have no other significance here.

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But the short answer to these points is that at the time of all the confessions petitioner could not have had any notion that he had been imposed on by Dr. Helfand. That only became evident when it appeared that the doctor had been deliberately planted by the prosecution for an improper purpose. Thus the views expressed by Judge Clark in the Court below are based on hindsight and have no place in this case. They have not the slightest relation to the claim of inducement.

3. The Court below also rested its conclusion on the supposed conflict in the evidence given by the two experts, Drs. Bellinger and Murphy. (208 F. 2d at 608) Judge Frank, in his dissent, has analyzed their testimony and shown that on the issue of inducement there was in fact no conflict. (Id at 612-615) On this phase of the case we can add little to the opinion of Judge Frank. But we must again stress the fact that the trial court charged the jury that it must find, *beyond a reasonable doubt*, that the state had met the burden of overcoming the presumption of inducement. (2681, 82)

How can it be maintained that the expert testimony here met this severe test when the state's expert, at best, expressed uncertainty? The discussion of this subject by the majority of the Court below appears to have rested on the belief that petitioner had the burden of showing that the inducement carried over. In such a case the "balanced" testimony of Dr. Murphy (208 F. 2d at 609, footnote) might have justified a jury in finding that petition had not met this burden. But here, where the burden was cast upon the state —and not merely to tip the scales, but to do so beyond reasonable doubt—that testimony was wholly insufficient to form a basis for a jury finding.

Moreover, absent lay testimony which creates an issue for jury consideration, mere conflict by experts cannot

create any such issue. For expert testimony has significance only in relation to non-expert testimony. Unless the latter creates an issue for consideration by the trier of the facts there is no place in the case for the expert. And, of course, that the experts disagree does not establish that a conflict did otherwise exist in the evidence. That is a question which must be decided by the judges, not by doctors. No experts, however eminent, can assume that function. Even disagreement among appellate judges as to whether, in a particular case, the evidence did create an issue of fact has never been considered to establish the existence of such an issue.

That expert testimony alone cannot create an issue of fact sufficient to justify submission of the case to a jury is, moreover, the law of New York. Judge Cohn of the Appellate Division for the First Department said in *Strasberg* v. *Equitable Life Assurance Society*, 281 App. Div. 9, at p. 13:

> "Words put in the form of an opinion uttered by a witness, even though he be an expert, cannot create an issue of fact when the factual basis for the opinion does not sustain his conclusion. The weight to be given a medical opinion where it is opposed to the facts, was discussed in *Matter of Horton* (272 App. Div. 646 affd. 297 N. Y. 891). There the court by Mr. Justice Foster made the following pertinent observation (pp. 650, 651): 'The testimony of contestants' lay witnesses was too trifling in our judgment to sustain fraud, undue influence or lack of testamentary capacity; and the opinion testimony of the physician called by contestants was entirely belied by clear and convincing testimony as to conduct and acts on the part of the decedent that established his mental competency at the time he executed his will. Whatever may be the ordinary thought of the worth of a medical opinion, where he is contradicted by the facts, the facts must prevail (*Matter of Burnham*, 201 App. Div. 621).' (See also *Shallow* v. *Metropolitan Life Ins. Co.*, 278 App. Div. 328

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affd. 303 N. Y. 827, and *Pettit* v. *Pettit*, 149 App. Div. 485.)"

See also

Matter of Stern, 235 App. Div. 60, at 67.

These observations are particularly pertinent here. For the subject on which the experts are said to have differed was whether or not a promise to a suspect that, if he confessed, he would not be prosecuted for first degree murder, would influence him to confess! No expert could possibly be qualified to give a negative answer and testimony purporting to do so should have been wholly disregarded.

4. Finally, the Court below (208 F. 2d at 610) took the view that it could ignore the trial court's charge that Dr. Helfand had made a promise of leniency, because its view of the evidence was different. No such contention had ever been advanced before, either by any of the state judges or by the prosecutor or by respondent here.

The reasoning by which the majority of the court below concluded that such an issue was open to it is entirely fallacious and rests on a misreading of the record. Judge Clark stated that the majority of the state Court of Appeals on the second appeal had rejected "that conception of the law"—i.e. that the trial court's characterization of the inducement must be accepted. But the state court did no such thing.

On the first appeal (302 N. Y. 353) Judge Froessel, referring to the premeditation statement by Dr. Helfand, had held that the issue of inducement should have been left to the jury. On the second appeal (304 N. Y. 468) Judge Dye commented that the trial court's statement that there was inducement as a matter of law was to petitioner's advantage—presumably because the court might have left it to the jury to interpret Dr. Helfand's remarks. But at no time did any of the judges of the New York Court of Ap-

peals even suggest the position now taken by the majority of the court below.

In effect, all that Judge Dye said that there was nothing inconsistent between declaring the Helfand confession bad because of coercion and permitting the jury to consider whether there had also been inducement and whether the effects of the coercion and the inducement carried over. That had been the ruling on the first appeal; it was accepted on the second without any further discussion of its implications. But petitioner is challenging the ruling as not justified by the record. On neither occasion did the state court indicate what evidence existed which might justify a finding that the effects of the Helfand inducement had worn off.

We submit that it is a denial of petitioner's right to due process for the Court below to proceed on a theory never before advanced by anyone. Even in civil litigation it has been held improper for courts to do this. In *Matter of Goebel*, 263 App. Div. 516, the Court said at p. 517:

> " 'Parties go to court to try issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue, and distinctly and fairly litigated.' (Wright v. Delafield, 25 N. Y. 266, 270. See also, Southwick v. First National Bank of Memphis, 84 N. Y. 420, 428; McNeil v. Cobb, 186 App. Div. 177; affd., 230 N. Y. 536.)"
>
> See also
>
> *International Photo Recording Machines, Inc.* v. *Microstat Corp.*, 269 App. Div. 485

All the more should this rule of judicial self-restraint operate in a case involving life and death. It would, indeed, be a denial of the constitutional right to counsel to permit a decision to stand on a point never before raised.

Moreover, the federal Court of Appeals on no conceiv-

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able theory had the right to determine a factual issue which, at the very least, should have been passed on by the jury.

To sum up:

1. The Court below had no power to disregard the charge of the trial court and decide the case on a theory never advanced by the prosecution, thus usurping the function of the jury.

2. There was no evidence from which a jury could find "beyond a reasonable doubt" that the promise of leniency made by Dr. Helfand did not carry over to the statements made to Captain Meenahan and the assistant prosecutors and these should all have been excluded.

3. At the very least the statements to Captain Meenahan should have been excluded.

Point II

PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED BY LETTING THE JURY PASS ON THE ISSUE OF THE CONTINUATION OF THE IMPACT OF THE COERCION.

The Court below gave no real consideration to the issue of coercion, mistakenly stating (208 F. (2d) at 609) that it "seems to be accepted" that the verdict of the jury settled the issue of coercion. Petitioner has never accepted this. He has contended throughout that his statements to Meenahan were improperly received because part of the tainted interview in which Dr. Helfand participated and that there was no evidence permitting an inference beyond a reasonable doubt that the coercion had worn off by the time he was interviewed by the assistant prosecutors so short a time thereafter.

Here, as in relation to the issue of inducement, petitioner contends also that the testimony of the experts (concededly, on this issue, in conflict) can be given no weight for lack of other evidence to which it could relate.

What we have already said about the continuity of the Meenahan-Helfand-Meenahan talks applies equally to this issue and should result in the barring of the statements to Meenahan. As bearing particularly on the issue of mental coercion we call attention to the colloquy between the doctor and Meenahan:

> "Q. Well, we were getting along very nicely. I am trying to straighten him out with his troubles. He seemed a little mixed-up. His mind is clear now. I made him concentrate. His mind is much clearer. You can take my seat, Captain" (fols. 1809-1810).

How Dr. Helfand had "cleared" his mind is, of course, vital. An examination of his interview shows repeated instances of his having offered to help, of being with petitioner "a hundred percent" provided he told the truth (1712, 1715, 1716, 1720, 1721, 1722, 1728, 1735, 1736, 1738, 1742, 1748, 1756, 1763, 1768, 1771, 1775, 1777, 1800, 1801, 1802, 1805, 1807). And, just before Captain Meenahan came back, is the ominous suggestion that if petitioner didn't show he had done it "in a fit of temper" they would "toss premeditation in and it's premeditation. See?" (1808).

On numerous occasions the doctor told petitioner that he was going to make him remember and make him talk and would place his hand on his forehead for that purpose (1689, 1690, 1695, 1708, 1715, 1722). Dr. Helfand even went so far as to threaten to give him an injection:

> "Q. You know you hit your mother first, you hit your mother on the head. Speak up. What did you do?
>
> "A. I don't know, doctor.
>
> "Q. Yes you do. Speak up now. Speak up. See, I can make you talk very freely. I can give you an injection now. It's much better if you tell it to me this way. Come on, now, speak up.
>
> "A. I can't think, doctor." (1726)

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Dr. Helfand left a few minutes after Captain Meenahan returned (929, 989) and, without any interruption whatever, Meenahan continued to talk with petitioner (930) who then first made statements which implicated him in the murder (932-960).

A little while later that same evening he also made a statement to two assistant prosecutors, Andreozzi and Gitlin (1202ff). In between he had made a statement to his business associate, Herrschaft (1047-1049). But while this implicated him in the killing, it was bare of all details and was wholly insufficient to justify a prosecution for first degree murder. Had this statement alone been received in evidence there must have been a directed verdict on that charge. In any case, no one can say how the jury would have decided.

And this Court has repeatedly ruled that if a confession has been improperly received there must be a new trial regardless of the character of the reamining evidence. See *Stroble* v. *California*, 343 U. S. 181, 190, and cases cited.

The rule with regard to the impact of a tainted confession on later ones was stated in the *Lyons* case, supra. There a confession had been obtained at 2:30 one morning following prolonged questioning. During the evening of the same day a second confession was obtained. For the majority, Mr. Justice Reed held that under the circumstances a question of fact existed. But he pointed out:

> "When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. * * *
>
> "The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the

> earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process" (p. 603).

No later cases have weakened the authority of those statements.

The case at bar is infinitely stronger than any previously before this Court. For here there is no dispute about the facts, there was no break in time, there were both coercion and inducement. All the challenged confessions are, in effect, but one and must fall with the conceded taint of the first.

Point III

THE PROCEDURES OF THE COURT BELOW WERE ERRONEOUS.

This case presents important and novel questions affecting the maner in which federal courts should deal with *habeas corpus* proceedings challenging state convictions which were not included in the enumeration of considerations for the guidance of the lower federal courts contained in *Brown* v. *Allen,* 344 U. S. 443.

Those questions all involve the extent to which a federal court may make an independent determination of an issue of state law actually decided by the state court in the particular case or disregard settled principles of state law previously decided in other cases.

First is the question whether a federal court can consider as a single question issues which the state court has ruled were to be considered separately. Second is the question whether a federal court can disregard the trial court's charge that the facts amounted to inducement, particularly when the state had never claimed that this finding was not

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justified by the evidence, either in the state appellate courts or in the federal courts and, usurping the function of the jury, resolve the factual issue so created by it.

Finally is the question whether a federal court can ignore the settled state law that conflicting expert testimony alone does not permit submission of a case to the jury.

It is, of course, elementary that the federal courts must respect state court decisions on matters of state law. That has been the rule, in diversity cases, ever since *Erie Railroad* v. *Tompkins,* 304 U. S. 64. Cf. *Sutton* v. *Leib,* 342 U. S. 402.

It is likewise the universal rule that this Court must respect state court decisions interpreting state laws even in a case involving federal constitutional issues.

See *Poulos* v. *New Hampshire,* 345 U. S. 395, 402.

Obviously the rules applicable to the trials of state criminal cases are entirely within the control of the states (except to the extent that federal rights are involved). Cf. *Wolf* v. *Colorado,* 338 U. S. 25; *Irvine* v. *California,* 347 U. S. 128. So here, the state court had exclusive concern with the question whether, under state law, the evidence amounted to a promise of leniency. The Trial Court having here found that there had been such a promise and that finding not having been disturbed on appeal, it was beyond the competence of any federal court to make a different ruling, and especially beyond its competence to resolve any factual issue.

Likewise, where the highest state court had ruled that the two issues, of coercion and inducement, should be separately considered, it was improper for a federal court to combine the two.

Nor could a federal court conclude that a supposed conflict of expert testimony alone created an issue of fact for the jury when the state law is otherwise.

Proper regard for the separate functions of state and federal courts and for the orderly consideration of these *habeas corpus* cases should require the federal courts to accept the law as determined by the state courts on all issues which are matters of state law only. That was not done in the case at bar.

Conclusion

Petitioner, therefore, asks this Court to reverse the order appealed from and direct the granting of the writ of *habeas corpus* to the end that he may be tried in the state court without there being used against him any of the statements made to Captain Meenahan or the assistant prosecutors. Indeed, this Court should make it clear that in view of the unwithdrawn inducement further prosecution for murder in the first degree would be improper.

Respectfully submitted,

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RESPONDENT'S BRIEF

Argued by APR 17
WILLIAM J. SIEGEL
HAROLD B. WIL

IN THE

Supreme Court of the United States

October Term, 1953

CAMILO WESTON LEYRA,
Petitioner,
—against—
WILFRED L. DENNO, WARDEN OF SING SING PRISON, OSSINING, NEW YORK,
Respondent.

No. 635

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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October Term, 1953

CAMILO WESTON LEYRA, *Petitioner,* —against— WILFRED L. DENNO, WARDEN OF SING SING PRISON, OSSINING, NEW YORK, *Respondent.*	No. 635

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement

The writ of certiorari is addressed to the United States Court of Appeals for the Second Circuit in review of its decree affirming an order of the United States District Court, Southern District of New York, which denied a petition for a writ of *habeas corpus* sought by petitioner against the respondent as Warden of Sing Sing Prison, New York. Petitioner is incarcerated in that institution pursuant to a judgment of the County Court of Kings County, convicting him of Murder in the First Degree for the killing of his father Camilo Weston Leyra, Sr., and sentencing him to be executed.

Record History of the Case

Petitioner has been twice tried upon an indictment charging him in two counts with the murder of his mother and father. The first trial resulted in his conviction of Murder in the First Degree on both counts, and in separate sentences to death. The judgments were unanimously reversed by the State Court of Appeals with an opinion reported in 302 N. Y. 353. Upon re-trial petitioner was again convicted; in this instance, however, of Murder in the Second Degree for the killing of his mother Katherine (the judgment now being on a pending appeal in the Appellate Division of the Supreme Court, Second Judicial Department) and of Murder in the First Degree with respect to the killing of his father.

The State Court of Appeals thereafter affirmed the judgment for Murder in the First Degree by a divided Court, with majority and dissenting opinions reported in 304 N. Y. 468. A stay of execution was issued on November 19, 1952 by Honorable Charles Froessel, a Judge of the State Court of Appeals, pending a petition to this Court for a writ of certiorari.

The petition was denied without opinion on March 16, 1953 (Black and Douglass, J.J. being "of the opinion that petition should be granted." (345 U. S. 918, 73 S. Ct. 730)), as was a petition for re-hearing (April 27, 1953; 345 U. S. 946, 73 S. Ct. 835).

Petitioner thereafter sued out a writ of *habeas corpus* in the United States District Court for the Southern District of New York. Ryan, D.J., dismissed the writ with an opinion appearing in 113 Fed. Sup. 556, but granted

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a certificate of probable cause for an appeal to the Court of Appeals which was accompanied by a stay of execution.

That Court (Chase, Ch.J. and Clark and Frank, Circuit Judges) affirmed the order of the District Court, Frank, C.J. dissenting, with majority and minority opinions appearing in 208 Fed. 2nd 605. A petition for re-argument was denied December 15, 1953 (not yet reported).

Questions Presented

Petitioner contends that (1) his rights to due process were violated by the receipt in evidence of confessions made by him to police officials and the District Attorney because these confessions were tainted by coercion practiced upon him by one, Dr. Helfand and also because these confessions were induced by an authorized promise of leniency made by Dr. Helfand; (2) the decision of the Court of Appeal is erroneous as a matter of law in that it disregards the instructions concerning the fact of inducement and promise given by the trial Court to the jury; and (3) the decision of the Court of Appeal conflicts with settled State law in the matter of the testimonial value of opinions expressed by expert witnesses.

Record Facts Material to the Questions Presented

While we understand that this Court will render its decision on the basis of the record of the second trial, we nevertheless submit that the issues presented thereby can be properly judged only in the perspective of both trials. Of important necessity also is a statement of the treatment by the State Court of Appeals of the facts presented in the first record and of the errors committed on the

first trial, and the directions given by that Court to the trial Court for its guidance on the second trial. Only thus, we submit, can the curative aspects of the second trial be understood and evaluated.

The First Trial, Conviction and Reversal

On Tuesday, January 10, 1950, petitioner's father and mother were found in their apartment, brutally beaten to death by numerous blows about the head and face. The gruesome discovery was made by petitioner, a cousin, Valdez, and petitioner's business partner, Herrschaft.

Matricide and patricide are the most horrible crimes upon the index of human evil, yet each alone is not unknown in the records of crime. We believe that the combination of both is unique in the history of the law.

Nevertheless, and with ample reason, petitioner early became suspect as the unnatural killer. The police investigation soon disclosed: (1) that petitioner had lied concerning the disappearance of clothing customarily worn by him, but which he denied having worn on the visit of discovery of his parents' bodies; (2) that although he was married and the father of three children from whom he lived apart, and despit his straitened financial circumstances, he maintained a separate menage for a paramour with whom he lived; (3) that he had given a demonstrably false alibi concerning his whereabouts on the murder-morning. (All circumstances pointed strongly to the falsity of his statement to the police that he had visited his wife in her New Jersey home on the occasion of her birthday); (4) obviously in order to hide his disposition of the blood-stained clothing which he had worn at the time

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of the killing, he had lied concerning the purchase of a suit of clothes and a pair of shoes; (5) his story of the purchase of a raincoat from a street peddler in the early morning hours of Tuesday, January 10th, was on its face incredible and undoubtedly fabricated to account for the disappearance of the overcoat which he usually wore; (6) his claim to have spoken to a telephone book distributor at 10:00 o'clock on the morning of Tuesday, January 10th, when he left his New York City apartment, was disproved by the record of the Telephone Company that the books had been left at the door because of his own absence and that of his paramour from the apartment.

Suspicious though the police were, they nevertheless permitted petitioner his liberty during Tuesday night, Wednesday and Thursday. He was questioned steadily, it is true, from Thursday afternoon, January 12th, and through the early hours of the following morning. This questioning, however, it is pertinent and important to note, was done entirely by one man, Captain Meenahan of the New York City Police. Completely absent were the "relays of officers, experienced investigators, and highly trained lawyers", and absent was any inquisitorial interrogation to the point where not only he, but they, were exhausted. (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 153; *Haley* v. *State*, 78 S. Ct. 302.)

More than this: even though at this time petitioner first admitted his presence in the parents' apartment on the morning of Tuesday, January 10th,—a presence which he had before consistently denied,—he was nevertheless permitted to attend the parental funerals on the morning of Friday, January 13th, and was thereafter taken to

a hotel for a haircut and shave and for the refreshment of sleep.

Petitioner then came into the company of Dr. Max Helfand, a psychiatrist, who spoke to him for a time. After his departure, Meenahan rejoined the petitioner, who then made to him a full confession, followed later by confessions to Herrschaft and the District Attorney.

Here, in the contact between petitioner and Dr. Helfand and in the statement made by petitioner to the doctor, as received in evidence at the first trial under directions which the State Court of Appeals ruled erroneous, is to be found the sole cause of reversal by that Court of the first judgments of conviction. No question existed of the sufficiency of the evidence to prove petitioner's guilt in requisite measure. The Court said:

> "The verdict rests largely upon alleged confessions of the defendant. If they were properly received in evidence, followed by proper instructions from the Court, the verdict would be clearly warranted, and we could not interfere with the execution of sentence for these brutal crimes."

We do not here argue the nature of this conduct and its effect in law upon the course of the first trial. That question has been settled for us by the State Court which thus characterized the episode:

> "Bearing in mind the undisputed setting in which this interview was arranged and recorded, while defendant was in custody of the police; defendant's physical and mental condition at the time, already alluded to; the psychiatrist, calling himself defendant's doctor, playing upon the latter's natural fears

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> and hopes, pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and implied; giving assurances in a pseudo-confidential atmosphere of physician and patient; and all the attendant circumstances taken together—this interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here."

The Court then ruled *why* the reception of this evidence was reversible error. There were two reasons. The first was thus expressed:

> "Whether the coercion, which we find implicit in defendant's statement to the doctor, extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a question of fact for the jury, and this question was never properly submitted to them. *These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions. Only thus would due process of law be accorded defendant.* (Lyons v. Oklahoma, supra.)" (Italics ours.)

The second infirmity in the case to which the Court referred related to promises claimed to have been made by Dr. Helfand to petitioner in the words: "These people

are going to throw the book at you unless that you can show that in a fit of temper you got so angry that you did it. Otherwise, they toos (toss) premeditation in and its premeditation." and more than once repeated in other language. Of this factor the Court wrote:

> "Another alleged infirmity in defendant's statement to the doctor is urged upon us. It is said that this statement contained promises of leniency which might be attributed, under the circumstances, to the District Attorney (Code Crim. Pro. §395; People v. Kurtz, 42 Hun 335; People v. Reilly, 224 N. Y. 90.
>
> • • • • •
>
> *Moreover, here again the jury should have been instructed to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor* (*Lyons* v. *Oklahoma,* 322 U. S. 596)." (Italics ours.)

This opinion spoke unanimously for the entire Court. We summarize it with full confidence in the accuracy of our summary: It was a direction to the People that upon the re-trial, petitioner's statement to Dr. Helfand should be submitted to the jury with instructions of a four-fold kind: (1) that the jury could in no event consider petitioner's statement to the doctor as evidence of guilt; (2) that the jury were to consider and evaluate the entire episode only in the light of its relation to the subsequent confessions to Meenahan, Herrschaft and the Assistant District Attorneys; (3) that if the jury found that any of these confessions was obtained, induced or affected by either the mental coercion or the promise of immunity *if such promise existed,* they must reject that confession as being not truly voluntary; and (4) that if for either

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of these causes, they rejected all the confessions, they must acquit petitioner because, as Froessel, J. wrote:

> "The verdict rests largely upon alleged confessions of defendant."

In view of the subsequent course of events following the second trial, we deem it of urgent importance to point out that no member of the Court suggested any permanent disqualification of the confessions by reason of promises of immunity. We shall deal more fully with this thought at page *seq.* of our brief.)

The Second Trial

The re-trial then followed. Inasmuch as it constitutes the record now before this Court for review, we give in greater detail the testimony submitted to the jury.

Medical testimony sufficiently established the cause of death as being fractures of the skulls and lacerations of the brains.

William Herrschaft, employed by the senior Leyra, and also petitioner's partner in a separate business located in the father's shop (307),* testified that the father neither came to the business office on the morning of Tuesday, January 10, 1950, nor telephoned an explanation of his absence (318). Petitioner, himself employed by his father, did not appear, but telephoned that he was going to New Jersey to visit his wife, whose birthday it was (320). Later in the day, the father still not having appeared at the office, Herrschaft, with petitioner and the latter's

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* References are to folios in the State Court of Appeals record.

cousin, Valdez, went to the Brooklyn home of the parents. Petitioner wore no overcoat, but did wear a tan raincoat which Herrschaft had never before seen (339).

The discovery of the bodies was made (350). It was not until Thursday, January 12th, that Herrschaft again met petitioner who at that time, *before any accusation had been made,* told Herrschaft that "he thought the police had him as No. 1 suspect" (373). In the meanwhile, the police had been questioning Herrschaft about petitioner's overcoat. When Herrschaft informed him of this, petitioner answered that he had lost the garment on January 10th (375), *after* the visit to the parents' home, during the course of which, he said, he had worn an overcoat. Herrschaft remembered, however, that it was the raincoat and not the overcoat which petitioner had worn, and when they consulted Valdez and Mrs. Gorman, the parents' neighbor, both agreed with Herrschaft (380, 382) that petitioner had worn, not the overcoat, but the raincoat, on the Brooklyn visit. Valdez (425) and Mrs. Gorman (459) so testified.

Lee Adamski, petitioner's paramour, left him in their Manhattan apartment when she went to her place of employment at 7 o'clock on the morning of Tuesday, January 10th (509). When they next met at 11:30 that evening, she noted that he was wearing a raincoat, new and strange to her (518). When she asked what had happened to his overcoat, he answered that he must have left it on the subway and that he had therefore purchased a raincoat (522). At this time she noticed also that he was wearing a new suit (527). She never again saw the one which he had been in the habit of wearing (530).

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Police Captain John J. Meenahan first met petitioner in the late afternoon of Tuesday, January 10th. Petitioner was then wearing a raincoat (575). On Wednesday they met again and Meenahan learned details concerning petitioner's family and also of his relations with Lee Adamski. Meenahan's questions concerning his overcoat were answered by petitioner's false statement that it was at his office (594). A search of the office of course failed to discover the garment (598).

Petitioner's explanation of his acquisition and possession of the raincoat was a classic of desperate improvisation. In addition to his employment by his father and his business partnership with Herrschaft, he worked nights as a bartender in the Greenwich Village section of New York. When he quit his work there at about 4:00 A.M. on Tuesday, January 10th, he purchased the raincoat from a peddler on the street. As he said: "Yes; that is the custom over there—there is always peddlers around at 4 A.M." (599).

Meenahan then asked him about the new suit which Miss Adamski had seen him wearing on Tuesday evening, and he replied that he had bought it on the previous Saturday, January 7th at the well-known Klein's store, and that he had caused cuffs to be put on the trousers (600). He also told the Captain that he had bought new shoes at a 42nd Street Army and Navy store. The testimony of reliable witnesses,—an employee of Klein's (1873) and the owner of the shoe store (1131),—combined to prove conclusively that these statements were false.

Petitioner sought to strenghten his alibi (based on his alleged New Jersey birthday visit to his wife on the morn-

ing of Tuesday, January 10th) by the claim that he had been in his New York apartment until at least 10 o'clock in the morning when he answered a door-bell ring and received a new telephone book from the Company's representative. Hassett, the Company representative, testified that, on the contrary, there was no response to his ring and he therefore left the book at petitioner's apartment door (1347).

Meenahan and petitioner were again together on Wednesday, January 11th, until about midnight, when petitioner freely left. They did not meet again until about 2 o'clock on the next afternoon when they talked again. About 7:30 that evening, January 12th, Meenahan taxed the petitioner with the lies about the purchase of the shoes and suit and with his false New Jersey alibi.

It had by now become obvious to petitioner that his prevarications were of no avail, and he therefore now made at least the beginning of an approach to the truth (619, *seq.*). For the first time he disclosed the bitter arguments which had taken place between himself and his father concerning the latter's business. For the first time he laid open the fact that the father had charged him with "putting him out of business". Later, and at 3 o'clock in the morning, petitioner admitted,—again for the first time,—that presence in the apartment on the murder-morning which he had up to now consistently denied. We feel entitled to stress the fact that this admission preceded by almost a whole day Dr. Helfand's contact with him, thus freeing of any suspicion of coercion or promise this contradiction of his former statement to the police that he had first come to the apartment on the after-

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noon of Tuesday, January 10th, then to discover the killings.

The next witness was Dr. Helfand (750-855). Even more important in the consideration of the case and more important than the doctor's testimony itself are the conditions under which that testimony was received. They can best be described in the words of the trial Judge:

> "The Court: In other words, none of the testimony offered by this witness will be considered by the jury on the question of the guilt or innocence of this defendant."
>
> • • • • •
>
> "The Court: The point I make is this. Let us be clear about it. If this witness testified to any incriminating statements made by this defendant, I want to say at the outset that the jury must not in any wise, shape, form or manner consider such statement as indicating any guilt on the part of this defendant."
>
> • • • • •
>
> "The Court: Yes; in that you are quite right. But what he says by way of incrimination is not to be considered as evidence of guilt against this defendant. That is right—that is as clear as I can make it. I will say it again and emphasize it. The testimony of this witness, if it indicates any statements made by this defendant, which tend to incriminate, must be disregarded in that respect. It is not received for that purpose."
>
> • • • • •
>
> "The Court: Is there anything you care to add by way of comment or explanation so that the recorder may be as clear as crystal? I think I have covered it."

These statements by the Court were agreed to by petitioner's counsel (753):

> "Mr. Healy: I think you have covered it."

The Court then said:

> "The Court: I shall say it again in the charge when we submit the case to the jury."

This promise to counsel was kept by a full and clear charge to the jury.

The colloquy which we have quoted occurred in the jury's presence. The combination of these clarifying statements, made preliminarily to Dr. Helfand's testimony, with the ultimate charge, almost the last words heard by the jury prior to their retirement for deliberation, leaves no doubt that Helfand's statement was permitted and received for the sole purpose of serving as a measuring rod for the assessment of the voluntary or involuntary nature of petitioner's subsequent confessions to Meenahan, Herrschaft and the Assistant District Attorneys.

To put it another way:

Helfand's examination was, in the understanding and with the consent of both sides, solely in the nature of a *voir dire* and only as a preliminary to the introduction of these subsequent confessions. The Trial Court so ruled (765). Helfand was in reality called for the benefit of the petitioner so that he might, on the basis of the mental coercion and promise, if such promise existed, urge the invalidity of these confessions. In a word, Helfand was in form only a People's witness. Actually he was a defense witness, appearing on the stand by mutual pre-arrangement

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among the Court, the defense and the People in obedience to the directions of the State Court of Appeals explicit in Judge Froessel's language:

> "Whether the coercion which we find implicit in defendant's statement to the doctor extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remain a fact for determination by the jury and this question was never properly submitted to them. These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions.
>
> • • • • •
>
> Moreover, here again the jury should have been instructed to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor (Lyons v. Oklahoma, supra)."

That Helfand had only this function is proved by the course of his examination. The prosecutor merely put to him a few questions designed to elicit his professional background and that he had met petitioner by arrangement with the District Attorney and through introduction by Meenahan. It was intensive defense cross-examination which brought out in detail Helfand's practices upon petitioner, thus giving to the jury a full picture of the incident which the Court of Appeals characterized as "ceaseless pressure", "torturing of the mind", and "mental coercion". Unquestionably the jury's later scrutiny of the subsequent confessions was made within the focus and the framework of this antecedent history.

To this fire of cross-examination upon the later confessions, the defense added the heavy reinforcement of Dr. Clarence H. Bellinger (857), Medical Superintendent of Brooklyn State Hospital. He had heard Dr. Helfand's direct testimony and his cross-examination (860). He was asked two questions,—the first by defense counsel and the second by the trial Court (865, 866):

> "Q. Now, doctor, assuming that those actions of the doctor were mental coercion, can you say with reasonable certainty, doctor, that said mental coercion carried over and affected any other subsequent statements that might have been made by the defendant?"
>
> * * * * *
>
> "Q. Well, can you, as a scientific man, state that in this particular defendant's case, the mental coercion, if exercised upon the defendant, would carry over to any subsequent time? Can you state with any definite certainty whether in your opinion it did?"

Dr. Bellinger was of the opinion that the mental coercion had "carried over" into the subsequent confessions. He gave his reasons for this opinion; reasons which may be summarized in his own specification that Capt. Meenahan, by sitting in the chair formerly used by Helfand during his interview with petitioner, became thus constituted a "surrogate" for Helfand and was thereby endowed with the coercive powers which Helfand had shortly before exercised over petitioner's mind.

The People met this diagnosis by the testimony of Dr. John M. Murphy, a qualified psychiatrist who expressed a contrary opinion concerning the effect of Helfand's rela-

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tions with petitioner upon the later confessions to Meenahan, Herrschaft and the Assistant District Attorneys (891). He, too, was familiar with the "surrogate" phenomenon relied upon by Dr. Bellinger, but he believed that it operated only where the psychiatrist directed the patient to recognize the succeeding person as a substitute for him. The mere "taking over the chair" would not be sufficient "to carry over a mental coercion if there was any" (911).

Similarly Dr. Bellinger opined with regard to the Helfand episode that this, which he considered to be a promise, was in petitioner's mind and carried over into the subsequent confessions (2087-2091). Dr. Murphy, on the contrary, testified: "I don't think that the effect of that would carry over no, I don't" (2093-2096). As to this witness, the appraisal of him by the Court below—that he took "care not to make over-dogmatic assertions"—is much fairer and more accurate than petitioner's strictures upon him that " * * * the State's expert, at best, expressed uncertainty." The Court below was indeed no more than just when it said:

> "Certainly even this testimony—and even if it be separated from the rest of his evidence—was contrary to the dogmatic opinion of the expert for the accused that the Helfand promises did carry over to control the later confessions. Were we now to say that this balanced testimony of Dr. Murphy, instead of presenting a jury issue, operated to remove from the jury all that had gone before, we should be setting a unique limitation upon the historic fact finding function of the jury in cases where a constitutional issue is raised."

By this scientific issue raised by the conflicting views of Dr. Bellinger and Dr. Murphy, *and by the contention of*

evidence contained in the case which served as the basis for their opinions, the Trial Court gave the jury an eminently proper basis for their consideration of the "carry over" question raised by Judge Froessel's direction which we have quoted at page 15 of this brief.

The Trial Court* admitted the confessions to Meenahan, Herrschaft and the District Attorneys, ruling that their voluntariness was a question of fact for determination by the jury. We summarize them but briefly in the knowledge that they will be read by this Court in full. Nevertheless, even these brief summaries prove the truthfulness of the confessions, and by their intimate detail of matters known only to petitioner, their freedom from any suggestion or coercion by Helfand. They fit, in mortised symmetry, the pattern described in the concurring opinion of Mr. Justice Jackson in *Watts* v. *Indiana,* 338 U. S. 49, 60:

> "We must not overlook that in these, as in some previous cases, once a confession is obtained it sup-

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* Petitioner did not, as he might under New York law have done, take the stand on the *voir dire.* A similar instance has been dealt with by this Court in *Stein* v. *N. Y.,* 346 U. S. 156, 176; 97 L. Ed. 1522, 1538:

> "The State did not seek to draw any inference adverse to defendants from their choice of silence, cf. Adamson v. California, 332 U. S. 46; 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223, beyond the obvious fact that their confessions have not been repudiated, their charge of police violence is left without testimonial support, and the police account of the confessions is undenied. In trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. The Constitution safeguards the right of a defendant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying. We cannot say that petitioners have been denied a fair hearing of the coercion charge."

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plies ways of verifying its trustworthiness. In these cases before us the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful. Such corroboration consists in one case of finding a weapon where the accused had said he hid it, *and in others that conditions which could only have been known to one who was implicated correspond with his story.* It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity." (Italics ours.)

The Confession to Meenahan

When petitioner finished his conversation with Helfand, he asked the doctor to summon Meenahan, saying: "He seemed to be a good egg and I would like to talk to him if I could" (929).*

Petitioner's confession to Meenahan was a narrative of deliberate murder. He arrived at his parents' home about 8 o'clock in the morning of Tuesday, January 10th (933)** and found them at breakfast. He and the father resumed an argument, begun the previous Sunday, and the father threatened to oust both him and Herrschaft from the father's business. The mother intervened, and for the first time in his life petitioner saw the father physically push

* There is no problem concerning the accuracy of Meenahan's and Helfand's testimony. Amplifiers and wire recorders located in another part of the police precinct left records. Nor is there any problem of bodily duress. It has never been contended on petitioner's behalf that Meenahan or his associates practiced the slightest physical violence upon petitioner.

** This corroborated the evidence of a People's witness, Caroline Parnell, who was later to testify that at about that time she had seen petitioner on the corner opposite his parents' home (1427).

her and heard him say to her: "Something I never told you in your life—keep your god damn mouth shut" (936).

Petitioner directed the father to go out for a newspaper and arranged that upon his return they would both go to the father's savings bank to withdraw money in order to make good a check, drawn on the business account, which had been returned for insufficient funds. (We turn now to a point which we made before the State Court of Appeals: If in fact there was such an arrangement concerning the bank, why should petitioner have suggested that the father make the extra trip for a newspaper,—an effort onerous for an aged man of 75 years? The newspaper could have been procured by the father as they went to the bank. This absence of the father from the house, it is obvious, was suggested so that petitioner could kill his mother and then, upon the father's return, eliminate him with equal murderous finality. Nor was there any question that the father did go out for the newspaper at this time. Harry Rheim, a neighborhood newsdealer, so testified.)

The father departed and petitioner picked up a hammer then lying on a dish closet. As he did so, his mother asked: "What are you going to do with that?" He answered: *"I am going to hit him over the big skull when he comes back. * * * This is going to end for once and for all"* (942). When the mother sought to calm him, he struck her with the hammer several times on the head. He was impelled to the murderous deed by an "instinct". *He did not want her to see him hit the father.*

In the very moment, almost, of this awful and unnatural crime, petitioner heard his father returning. He went the long way from the kitchen in the rear of the apartment

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to the front door, and, as the father turned to close that door, struck him with the hammer. The father "turned around to sort of put up a struggle". Petitioner struck him with the hammer, and struck and struck again,—a prolonged assault pregnant with premeditation which clearly puts upon the killing the stain of First Degree Murder.

The murderer, uniquely a matricide and patricide, left the house and, walking along the street, threw the hammer into a passing truck (952). Then, going back to his love nest in Manhattan, he bathed and changed his blood-stained clothing (954) which he gave to a passing rag picker (956). He took a box of candy as a present for his wife in New Jersey (956). There he remained but a short while, returning to New York shortly after Noon. Later in the day, he, Herrschaft and Valdez went to his parents' home and there discovered (!) the bodies.

The Confession to Herrschaft

Some time after petitioner had confessed to Meenahan and at 7:30 P.M. on Friday, January 13th, he spoke to his business partner Herrschaft. (The record does not disclose the length of the interval.) He gave Herrschaft the combination of the business safe saying: "Here is the combination of the safe. I want you to get administrative powers and operate the company" (1047). Herrschaft, never before having possessed the combination, was understandably perplexed. Petitioner explained to him "Well, you know what it is all about; I did it." The startled Herrschaft asked: "Do you mean that you killed your own mother and father?" Petitioner replied: "I did." Herr-

schaft, in amazement, asked why and petitioner answered: "Oh, I don't know; I guess I just blew my top" (1049).

It is notable that although Herrschaft had been in and about the police station for several hours prior to this meeting with petitioner, no one in authority (1071, 1074, 1082) had spoken to him. Moreover, he did not know that his conversation with petitioner was being recorded (1084). In sum, there is not a scintilla of proof that petitioner's confession to Herrschaft was other than completely voluntary.

This was utterly damning testimony by a witness whose prior friendly relations with petitioner could not be questioned. It was so assayed by defense counsel, who entered upon the most rigorous cross-examination which, however, in no way affected either the credibility or the force of Herrschaft's evidence. In petitioner's brief before the State Court of Appeals, counsel spoke of the confession to Herrschaft as only "a cryptic admission by the appellant". This has always struck us as a masterpiece of understatement.

The Confession to the District Attorney

More than two hours after his unsolicited confession to his friend and partner Herrschaft, and some four hours after the confession to Meenahan, petitioner again confessed,—this time to representatives of the District Attorney. We deem it important that his confession was *in narrative form.* The Assistant District Attorney said: "Tell us exactly in your own words what transpired after you got into your folks' apartment", and from that point on, the petitioner in his own words told in detail the story

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of the slayings. For one familiar with the difference between suggested or coached confessions on the one hand, and true confessions on the other, there can be not the slightest doubt that the recital came, not from anyone's promptings, but solely out of the reservoir of petitioner's own experience. Again we point to its conformity with the test described by Mr. Justice Jackson in *Watts* v. *Indiana, supra* (p. 18 this brief).

We summarize. He arrived at his parents' home at about 8:30 A.M. on Tuesday, January 10th, 1950 (1204). At the door some pleasantries passed between him and his mother. He found his father at breakfast in the kitchen. Immediately there ensued the continuance of a business argument which had occurred on the previous Friday and Sunday (1211). In great anger, the father made "several nasty allegations" about petitioner and Herrschaft and the partnership between them, claiming that it existed to the detriment of his own business in which they were simultaneously employed. The mother took sides with petitioner and expressed the wish that the aged father should discontinue his business activities. For the first time in petitioner's knowledge, the father pushed the mother. Finally, the father left to buy a newspaper but not before he had conferred "a few parting insults to myself and my mother" (1217).

While Leyra Sr. was absent, petitioner told his mother that upon his return "we will settle this argument once and for all". She tried to calm him. There then shortly occurred the double killing which petitioner thus pictured:

> "He then came through the outer hallway and entered the apartment. While he was entering, I

> picked up a hammer that was laying on the shelf of the dish closet between the dish compartment and the knife and fork drawer. I finally became violent at this point. This violence was the direct cause of the double tragedy."

He struck,—and killed,—his mother with the hammer, and, going into the hall to meet his returning father, struck him on the head a number of times (1219).

The balance of his confession disclosed the disposition of the hammer in the truck; the change of clothing at his Manhattan apartment and their gift to a rag picker, and his birthday visit to his wife's home in New Jersey. (It is nothing less than a certainty that this visit was not for the uxorious purpose of celebrating her birthday, but solely for the fabrication of an alibi.)

Two Assistant District Attorneys who witnessed petitioner's demeanor while he confessed to them testified that he was in all respects normal. One, Mr. Gitlin, described him as "calm, cool and spoke to me in a quiet manner, and told me the entire story." *Defense counsel did not cross-examine either witness.*

Notably, at no time during his stay with these public officials did petitioner even once refer to any promise of immunity. He sought no ratification by them of anything which Helfand had said to him and gave no indication in the slightest degree that his confession to the District Attorney was being made in reliance upon such promise. That he would have done so if the confession came from him other than out of the promptings of his own will is a fact of human nature too certain to be disputed.

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Further Psychiatric Testimony for the People

We have heretofore mentioned the conflict between Dr. Bellinger and Dr. Murphy concerning the "surrogate" theory as the basis of the "carry over" effect of Dr. Helfand's treatment of the petitioner on the subsequent confessions. In order to dispel any doubt which this clash between the psychiatric experts may have left in the lay jury's minds, Helfand was recalled. He testified that when Meenahan came into the room at the conclusion of Helfand's interview with the petitioner, he, Helfand, in politeness merely said: "You can take my seat, Captain" (1530, 1810). This was indeed a simple factual situation out of which, like the genie from Sinbad's bottle, sinuously emerged the whole portentous "surrogate" defense.

Defense cross-examination of Helfand was not limited to the issue thus raised. Counsel probed further into the transcript of the wire recording made during the Helfand-petitioner contact in an attempt to show that Helfand had suggested to petitioner both the substance and the detail of his later confessions to Meenahan, Herrschaft and the Assistant District Attorneys. *Out of hearing of the jury*, the Trial Court thus warned counsel (1547):

> "The Court gives you notice, and serves notice upon you now that you are opening the door to a reading of the entire record that was had, concerning the questions put by Dr. Helfand, and the answers made by this defendant. I have studiously kept that out of the record, having in mind the decision of the Court of Appeals. You are now, by your conduct, insisting that the record be brought into evidence."

Defense counsel, however, was not deterred by this warning from his persistence in referring to the wire re-

cording,—persistence to the point where the prosecutor felt constrained to offer, and the Court to receive, the entire transcript on this question of suggestion (1679-1810). The Court received it, however, subject to, and stressing. all its invalidities, illegalities and infirmities, saying (1590):

> "I am receiving this merely on the question as to whether or not whatever statements the defendant made then, or he may have made later, were inspired by this doctor; were put into this defendant's mouth by this doctor, was put into his mental reservoir by this doctor, and I say the issue has been raised by counsel, and I think the District Attorney is within his rights in offering this evidence; and on the question of whether or not the confession was voluntary or involuntary, *I rule it was involuntary. I rule it was illegal,* but on the question as to whether or not the doctor inspired what the defendant later said is a question that has now been raised by counsel for the defense and your objection is overruled.
>
> Mr. Healy: And another ground—
>
> The Court: It is only for that reason I will take this evidence and no other reason, and I shall instruct the jury at length on that point during my charge, if the case is submitted to the jury." (Italics ours.)

The Trial Court expressed his reason for permitting the reception of the wire recording transcript in this further fashion (1619):

> "Now that the question has been asked of the doctor 'Didn't you suggest this' and 'Didn't you suggest that?' don't you think the jury has a right to know what happened between the defendant and Doctor Helfand to determine what the defendant later said was out of the reservoir of his own mind? Did it

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come from his mental storeroom, or was it something that was placed there by a physician who concededly used, according to the decision of our highest court, mental coercion? I think that is logical. That is sense. And I think without that I would be depriving the prosecution of what belongs to them, what is their right. You cannot ask a question of that kind and plant a seed of suspicion in the minds of the jury and say, 'Oh, no, we will not let you see the rest of it. We will hold you to this one little question,' and then go to the jury and say, 'You see, gentlemen, of course, he made a confession later, but what happened was this: Dr. Helfand put all these details into his mind, that he was merely a puppet, merely a ventriloquist's dummy, what some doctor put in his mind. If that is not law, it is just good horse sense, good common sense, and I don't think you can shut off the District Attorney after opening the door as you did, after being twice warned."

The People's case closed with the reading into the record of petitioner's testimony at the first trial concerning his relations with Dr. Helfand. The substance of that testimony was that, as a result of the doctor's physical manipulation of petitioner's body and of his mental treatment of petitioner's mind, petitioner ultimately "drifted off so I lost consciousness. From that time on I did not remember anything until Sunday" (1925).

This testimony was received for a valid purpose. We have noted that throughout the trial, the Court had told the jury that the Helfand incident constituted mental coercion. We will see later that the Court charged the jury to the same effect. The prosecutor therefore faced the argument that the influence of Helfand's coercive and

illegal methods would be presumed to carry over, affect and taint the subsequent confession (*People* v. *Sweetin*, 325 Ill. 245, 2 Wharton Crim. Ev., 11th Ed. Sec. 601) unless proof beyond a reasonable doubt existed that " • • • the influence which induced the original confession had been removed and the party confessing was no longer dominated by such influence" (*People* v. *Sweetin, supra*).

Petitioner's testimony on the first trial met this test and furnished this prophylactic evidence. Unless Dr. Bellinger's diagnosis could be accepted as psychiatric verity, a person who has "drifted off so I lost consciousness" cannot be and remain under the influence of an antecedent mental compulsion or stimulus of a promise. Dr. Bellinger's pronouncement to the contrary were incredible. Certainly the jury, within whose province of determination this question lay, found it incredible. (*People* v. *Sherwood*, 271 N. Y. 427, 429; *People* v. *Egnor*, 175 N. Y. 419, 424.)*

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* This use of petitioner's testimony on a former trial did not constitute involuntary self incrimination. The use on a subsequent trial of testimony voluntarily given by a defendant on a former trial is sanctioned both where he testified at the second trial (*Warde* v. *United States*, 158 Fed. 2nd 651; *Indian Fred* v. *State*, 36 Ariz. 48; *People* v. *Boyd*, 67 Calif. App. 292; *State* v. *Duffy*, 57 Conn. 525; *Cadys* v. *State*, 198 Ga. 99; *Miller* v. *People*, 216 Ill. 309; *State* v. *Rogers*, 56 Kan. 362; *Bess* v. *Com.*, 118 Ky. 858; *Henze* v. *State*, 154 Md. 332; *Com.* v. *Reynolds*, 122 Mass. 454; *State* v. *Newman*, 127 Minn. 445; *Mackmasters* v. *State*, 83 Miss. 1; *People* v. *Speyer*, 207 Mo. 540; *State* v. *Wright*, 38 N. M. 427; *State* v. *Farrell*, 223 N. C. 804; *Comm.* v. *Brown*, 66 Pa. Super. 519; *Rafferty* v. *State*, 91 Tenn. 655; *Rodriguez* v. *State*, 130 Tex. Crim. 438; *State* v. *Tellay*, 100 Utah 25; *Furtig* v. *State*, 100 Wis. 301), and where he does not take the stand at the second trial. (*Heller* v. *United States*, 57 Fed. 2nd 627; *State* v. *Kimes*, 152 Iowa 240; *State* v. *King*, 102 Kan. 155; *State* v. *McPherson*, 77 Or. 151; *Scherpig* v. *State*, 112 Tax Crim. 61.)

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The Defense

Unlike his action at the first trial, petitioner did not take the stand at the second trial.*

Instead, Dr. Bellinger was recalled to amplify the "carry over" testimony which he had given on the *voir dire*. His testimony included statements which the jury obviously rejected. As a sample we cite his assertion that, even though petitioner's answers to the questions put to him by the Assistant District Attorneys during the last confession were coherent, descriptive and responsive, and even though the questions themselves were not leading in nature, nevertheless petitioner's mental condition at that time was one of "deep state of mental coercion" and that "he was in a merely semi-conscious condition" (2025).

In rebuttal, Dr. Murphy completely denied these assertions and testified to his conclusion, from the voluntary and detailed nature of the confessions to Meenahan, Herrschaft and the District Attorney's representatives, that petitioner had free will, and was fully conscious when he inculpated himself (2076 *seq.*). There was thus raised for the consideration of the jury an issue of fact which the jury was empowered to resolve against Dr. Bellinger.

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* The New York law concerning failure of a defendant to testify in his own behalf is that while such failure does not create any presumption against him, nevertheless both the jury and appellate courts are thereby warranted in taking the facts and circumstances, which, if he were innocent, he might have controverted or explained, most strongly against him. *People* v. *Smight*, 114 App. Div. 513, app. dis. 187 N. Y. 557; *People* v. *Trombino*, 238 App. Div. 61, aff'd 262 N. Y. 689; *Slower* v. *People*, 56 N. Y. 315; *People* v. *Marks*, 146 App. Div. 11. Therefore both the jury and the State Court of Appeals could weigh this failure in considering the effect of the testimony as to petitioner's false alibi, etc. and his demeanor and conduct during the periods of confession.

(*People* v. *Leyra, supra; Lee* v. *Miss.*, 332 U. S. 742, 92 L. Ed. 330.)

The Trial Court's Charge

It is impossible by mere summary or quotation to show the complete fairness of the instructions which the jury received through the Court's charge. Therefore, insofar as it deals with the statement to Dr. Helfand and the post-Helfand confessions, we give it in full (2672):

> "Let us return now, Gentlemen, to a consideration of the alleged confessions said to have been made by this defendant. I charge you, Gentlemen, of the jury, that the law governing confessions is as follows:
>
> > 'A confession of a defendant, whether in the course of judicial proceedings, or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.'
>
> "I shall now deal, gentlemen, with the last provision of the statute, namely, 'It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.' This simply means that it must be established by the evidence that, in addition to the confession, there was proof that the crime charged had been committed. The law does not demand that there be an eyewitness who saw the crime committed. All that the law requires is that it be established in this case that Mrs.

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Leyra was killed by someone and that Mr. Leyra, Sr. was killed by someone. In connection with this matter, you will consider the testimony given by those who discovered the bodies, the testimony of Dr. Ruger as to the violence that was visited upon these persons which allegedly caused their deaths.

"Now, what do we mean by the word 'confession'? A confession, gentlemen, is a voluntary statement made by a person declaring that he committed the crime. The form of the confession is immaterial. Testimony of an oral confession is competent even though it has not been reduced to writing and signed by the accused. It may consist of detailed conversations with people, it may be a formal confession. A confession is admissible although elicited in answer to questions which assume the person was guilty.

"As you have already been instructed, the burden of establishing each and every element of the crime charged, and the guilt of the defendant thereof, must be borne by the prosecution. Therefore, the burden of establishing the voluntariness of the confession must be borne by the prosecution. The word 'voluntary' imports a condition of mind which is free and unconstrained. In other words, was the making of the confession a free exercise of will on the part of the defendant? Was it made with a full and complete knowledge of the nature and consequences of the confession, free from influences affecting the will of the defendant at the time confession was made. It is obvious that, if a confession itself is to have any testimonial value, it must be shown to have been made under conditions where there was normal exercise of all the faculties, and that the declarent fully comprehended the effect of his confession. As to whether a confession is voluntary, or involuntary, is a question of fact for the jury.

"There are several problems that arise in this case with reference to the confessions allegedly made by this defendant. Let us first consider the alleged confession made to Dr. Helfand. Does this confession meet the specifications provided by the statute which I have read? (a) Was it voluntary? (b) Was it induced by any promise of leniency?

"*I charge you, gentlemen, as a matter of law, that the so-called Helfand confession was not voluntarily made; that it was due to mental coercion practiced by the physician upon the defendant. That, in and of itself, renders it worthless as evidence of guilt. It may not be regarded by you, even in the slightest degree, as any evidence of guilt. I charge you also, as a matter of law, that this so-called Helfand confession is invalid and may not be considered by you as evidence of guilt, on the further ground that Dr. Helfand, who was then acting for the District Attorney, made a promise to the defendant in order to induce him to confess, and,* thus did induce him to confess by reason of such promise; the said promise being, in effect, that if he made such confession, he, the defendant, would not be prosecuted for the capital offense of murder in the first degree, but, possibly, for a lesser crime. *Therefore, it is now clear that the Helfand confession may not, under any circumstances, be considered by the jury as evidence of guilt.* The Helfand confession becomes material with regard to another problem which I shall discuss with you later.

"We shall now consider the so-called Meenahan confession. First, we must determine whether the confession was made. If you find that such confession was in fact made, as claimed by the prosecution, you must then determine whether the provisions of the law governing confessions which I have already

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called to your attention have been violated, and, thus, rendered the confession worthless as evidence of guilt.

"As already noted, you must determine whether this confession was voluntarily made. The burden is upon the People to satisfy you beyond a reasonable doubt that it was voluntary and not made under a promise of leniency.

"In arriving at a solution of these problems, I charge you that you are bound to consider the established fact that Dr. Helfand practiced illegal coercion upon the defendant and made authorized promises of leniency to him. *The presumption is that such coercion and promise of leniency continued to affect the defendant's later confessions;* unless the prosecution has convinced you, beyond a reasonable doubt, from all the credible evidence in the case, that such coercion and promise of leniency did not extend over and affect the later confession made to Meenahan. Unless you are so convinced, the later confession made to Meenahan must be entirely disregarded and not considered by you as evidence of guilt.

"Let us now turn our attention to the so called Herrschaft confession. Gentlemen, the same elements must be considered by the jury, to wit: Was the confession made? Was it voluntary? Did the Helfand coercion and the promises extend over and affect this confession? Did the prosecution sustain the burden of establishing, beyond a reasonable doubt, that the coercion and promises did not carry over and affect the Herrschaft confession? Is the confession true? The same principles of law, to which I have made repeated reference, apply with equal force in this instance. It is only if you find,

beyond a reasonable doubt, that the confession was voluntarily made and true that you may consider it as evidence of guilt.

"With regard to the so called Assistant District Attorney's confessions, the very same rules apply in this regard. The same standards to which I referred in discussing the Meenahan and Herrschaft confessions, concerning voluntariness, apply to this confession as well. The People must, as in the other instances, prove to your satisfaction, beyond a reasonable doubt that this confession was voluntarily, made in order that it may be considered by you as evidence of guilt. You must also be satisfied, beyond a reasonable doubt, that the promise of leniency made by Dr. Helfand did not carry over and induce and influence the making of this confession to the Assistant District Attorneys.

"Each confession, gentlemen, must be considered separately. Is that clear? Each stands on its own bottom. The jury must determine whether the particular confession under consideration has been obtained in violation of law which the Court has charged. Was the Meenahan confession legally obtained? If it was, then the jury must act upon it. Was the Herrschaft confession legally obtained? If it was, the jury will consider it. If it was not, it is worthless as evidence. Was the Assistant District Attorney's confession legally obtained? If it was, the jury will consider it. If it was not, it must be rejected as worthless.

"*Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the Court rules, as a matter of law, that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty.*

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"Gentlemen, you will recall that I permitted the District Attorney to read the Helfand confession. Although the Court has declared the same, as a matter of law, to have been obtained by illegal means, the reason for the Court's action is as follows: During the course of the cross examination of Dr. Helfand, defense counsel sought to establish that the doctor prompted the defendant; in other words, suggested to him certain details concerning the commission of the crime. It may, therefore, become material, when the jury examines the contents of the Meenahan, Herrschaft, and the Assistant District Attorney's confessions, to ascertain to what extent, if any, Dr. Helfand had prompted the defendant. *In other words, whether details that he, the defendant allegedly related in the Meenahan, Herrschaft and Assistant District Attorney's confessions were something that was inspired by Dr. Helfand, or, was the defendant, himself, the author of the details that he allegedly supplied in the several confessions?*

"Gentlemen, I have not dealt here at any length whatever with the testimony adduced by the experts called by the respective parties, that is, Dr. Bellinger and Dr. Murphy. It is appropriate, however, to present in capsule form the contentions of the parties:

1. The defendant contends, with what force and effect, of course, it is for you to say, that the coercion and promise referred to did in fact carry over and into each of the subsequent confessions.

2. The prosecution, on the other hand, contends that the coercion and promise by Dr. Helfand did not in anywise extend over into any of the confessions made to Meenahan, then to Herrschaft, and then to the Assistant District Attorneys; that the

confessions so made to these persons were entirely voluntary and not induced by any promise of leniency.

"You have heard the testimony of these experts. They have given you their conclusions; they gave you their reasons for their conclusions. Gentlemen, the law permits an expert who is skilled in a particular science not only to testify to facts, but to give his opinion upon questions of a scientific nature. This is allowed because an expert is supposed, from his experience, research and study, to have a peculiar knowledge upon the subject of the inquiry, and an expert is supposed to be more capable than a layman of drawing conclusions from facts and to base his opinion upon them.

"In determining the value of the testimony of an expert, you should consider his learning, professional standing, opportunities for study, and his experience. It is of great importance that, in appraising the testimony of an expert, due consideration be given to all of these factors and that the facts from which his conclusion is drawn should be found to be satisfactorily established, since false premises may render such an opinion valueless. The testimony of an expert serves merely as a guide to the jury in its deliberations on the facts, of which they are at all times the sole and exclusive judges. Expert testimony should not be accepted or rejected indiscriminately, but it is to be weighed and considered by the jury the same as any other evidence. After weighing and considering such evidence, the jury is at liberty to disbelieve it when it is improbable, or when it is discredited, or when the jury believes that an expert witness has testified falsely, or was mistaken with respect to any material fact or opinion. The reasons or opinions of an expert

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are not conclusive upon a jury; but the jury should not arbitrarily or lightly reject the testimony of an expert, nor should the jury accept it just because the witness is an expert." (Italics ours.)

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. Code Section 1254.

We shall demonstrate that jurisdiction is totally lacking; that petitioner's confessions to Meenahan, Herrschaft and the District Attorney were legally obtained under both State and Federal law; that in the matter of procedure the issue of the legality of such confessions was properly submitted to the jury and that, therefore, there was no denial of due process. Petitioner's principal contention that the Helfand contact affected and induced, and thereby vitiated, the subsequent confessions is, we have shown, without basis of fact and is, we will hereafter show, without support in law.

The Petition for Certiorari (and for rehearing) Denied by This Court

Since under *Brown* v. *Allen* (344 U. S. 443, 97 L. Ed. 469), the denial of certiorari by this Court to review State proceedings is deemed to be without substantive significance, we reserve our discussion of the merits for the next succeeding portions of this brief.

POINT I

The order of the District Court denying the petition for a writ of habeas corpus and the order of the Court of Appeals affirming this action were proper on the facts and the law. The confessions to Meenahan and the District Attorney were legally received in evidence.*

In the Court below as here, petitioner took umbrage with the method, as well as with the fact, of the District Court's decision. He urged that the District Court failed in its obligation to examine independently the constitutional issues raised and erred, first, in giving "alert deference" to the judgment of the State Court, and second, in accepting without sufficient basis in fact the jury's finding as to freedom from taint of coercion and inducement in the Meenahan, Herrschaft and District Attorney confessions. (The petitioner did not claim that the District Court had erred in giving weight to the antecedent denial of certiorari by this Court. That issue, therefore is not in the case.)

The first criticism levelled at the District Court is obviously captious. This Court, in *Brown* v. *Allen, supra, has* held:

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* Petitioner does not claim here any constitutional infirmity in the reception of the Herrschaft confession. Also, Judge Fuld in the dissenting second opinion in the New York Court of Appeals distinguished this from the confessions to the State authorities:

> "True, that confession may stand in a category different from those made to prosecutor and police; other considerations, considerations separate and apart from the District Attorney's promise, may have prompted defendant to confess to his friend. I am willing to assume, therefore, that the Court was warranted in leaving to the jury the question whether or not the promise induced defendant's confession to Herrschaft, * * *."

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> "So far as weight to be given the proceedings in the Courts of the State is concerned, a United States District Court, with its familiarity with State practice is in a favorable position to recognize adequate State grounds in denials of relief by State courts without opinion. A fortiori, where the State action was based on an adequate State ground, no further examination is required, unless no State remedy for the deprivation of Federal constitutional rights ever existed (citing cases). *Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the State's resolution of the issue.* Malinski v. New York, 324 U. S. 401, 404, 89 L. Ed. 1029, 1032, 65 S. Ct. 781." (Italics ours.)

In the same case, this Court wrote:

> "The decisive and serious responsibility of compelling State conformity to the constitution by overturning State criminal convictions should not be exercised without clear evidence of violation."

The District Court correctly found upon the facts that there was no such "clear evidence of violation." On the contrary, after plenary review of the record in the State Court, the District Court held:

> "I conclude that the facts are not irreconcilable with a finding by a jury that the subsequent statements of petitioner were voluntary. Here, I find that since 'different inferences may fairly be drawn from admitted facts, the Trial Judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses, but the legal duty is upon them to make the decision'. Lyons v. Oklahoma, supra, 602."

This finding of fact was made after a careful examination of the trial record and after a meticulously accurate appraisal of the Trial Court's charge, of the decisions by the State Court of Appeals, and of the decisions of this Court on the question of due process as related to the voluntariness of confessions.*

This, we submit, is a fair summary of petitioner's contention in this Court: the invalidity of the Helfand statement so permeates and taints the subsequent confessions to Meenahan and the District Attorney that the latter group were themselves inadmissible under the Fourteenth Amendment. The elements relied upon to establish the continuity of the original invalidity are (1) the closeness in point of time between the Helfand contact and the making of the later confessions, and (2) the consequent "carry over" effect of the Helfand incident.

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* The wide discretion accorded Federal District Courts in the *habeas corpus* review of State criminal judgments was, we submit, accurately exercised in the light of New York's historic policy of great protection of the concept of due process now embedded in the Fourteenth Amendment to the Federal Constitution. This Court in *Stein* v. *New York*, *infra*, commented favorably thereon (171):

> "The ideal of fair procedure was self-imposed by New York long before it was imposed upon her. New York's Constitution has enjoined observance of due process of law at least since 1821, and statute law has provided for exclusion from evidence of coerced confessions since 1881. The Court of Appeals is charged by the State with ultimate authority in such a case as this to adjudge and redress violations of that mandate.
>
> Their appeal, taken as matter of right, afforded petitioners a review with a latitude much wider than is permitted to us. That Court, in a death case, is empowered by statute to order a new trial for errors of law, or if the conviction is found to be 'against the weight of evidence,' or if the Court is satisfied for any reason whatever 'that justice requires a new trial'."

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Petitioner seeks support for this contention—in its aspect of promise of immunity—in the dissenting opinion of Fuld, *J.*, in the State Court of Appeals that:

> "The trial judgment charged unequivocally that Dr. Helfand had promised defendant, 'in order to induce him to confess,' that he would not be prosecuted for murder in the first degree, that such promise was authorized by the district attorney and that defendant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Proc. §395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the district attorney or those associated with him in the investigation and prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the district attorney and to a police captain—made within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to defendant."

The first answer to this contention is that even assuming the correctness of Judge Fuld's analysis and legal appraisal of the Trial Court's charge as to promise of immunity, that promise did not create a *constitutional* bar to the admissibility of the Meenahan and District Attorney confessions. Since any bar which Fuld, *J.*, found to be thus existing owed its force to New York local law (Code

Crim. Pro. Sec. 359), it presents no Federal question. The District Court correctly so held, as did the State Court of Appeals in its amendment to the remittitur to certify that "upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States: Whether the defendant was deprived of due process guaranteed by the Fifth or Fourteenth Amendments thereof in the admission into evidence of the confessions of the defendant and in the admission into evidence of the testimony given by defendant on a prior trial. The Court of Appeals held that the rights of the defendant under the Fifth and Fourteenth Amendments of the Constitution of the United States had not been violated or denied." 304 N. Y. 844.

And even if it be conceded *arguendo* that the issue of promise of immunity is a Federal issue, the answer is that Judge Fuld's decision errs both in approach and conclusion.

An analysis of his entire dissenting opinion (concurred in by the late Chief Judge, Loughran) demonstrates that he found fault with the submission to the jury of the Meenahan and District Attorney confessions *only* on this ground: that the promise of immunity debarred the confessions. He considered it legally permissible for the jury to determine as a question of fact the voluntary nature of these confessions in so far as the element of "mental coercion" was claimed to have invalidated them for all time. The defense contention that the period of time intervening between the Helfand contact and these confessions was so short as to obviate any possibility of the disappearance of the mental coercion was, he holds by silence on the

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subject, not grounded in law. In sum, he treats the coercion-time-confession sequence as a question of fact, but the promise-time-confession as a question of law.

With great deference to the learned Judge, we submit that his position is erroneous for a number of reasons.

First, as we have previously pointed out, he joined with the entire Court after the first trial in reversing the judgment of conviction because the later confessions were submitted to the jury without pointing out to them the invalidity of the Helfand statement and without the requiremen that the jury subject these confessions to scrutiny as to the carry over effect of the Helfand incident. He gave no intimation at all that he considered the Meenahan and District Attorney confessions *for any reason* permanently inadmissible. We do not even intimate, of course, that a Judge may not change his mind; but we do submit that the force of this later decision is seriously minimized by a prior inconsistent position.

Second, in his dissenting opinion the learned Judge assumes it to be the law that there was an authorized promise of immunity to petitioner, both in fact and because the trial Court so charged. It is true that the trial Court so charged. It is also true, as petitioner urges in his brief here, that the prosecutor's position has "consistently been that Dr. Helfand's promise of leniency would have bound him not to seek a first degree conviction." We acknowledge that both the trial Court and the prosecutor erred in assuming this fact and taking this position. Both were led into this error by misreading the unanimous opinion of the New York Court of Appeals in its reference, after the

first trial, to Helfand's statements to petitioner. That reference was:

> "Moreover, here again the jury should have been instructed to consider separately the later confessions, in the light of any promise *that may have been* made during defendant's statement to the doctor." (Italics ours.)

This, which the trial Court and prosecutor both construed as a ruling that as a matter of law there was such promise of immunity, was not at all such a ruling. On the contrary, it was a holding that whether or not Dr. Helfand's statements to petitioner amounted to a promise of immunity was itself a question of fact for the determination of the jury as a necessary preliminary to a finding on the question of the effect of such promise on the voluntariness of the subsequent confession.

This is likewise the position of the Federal Court of Appeals (as to which, more hereafter) and it was the elucidation of this principle by that Court which made clear to us the error in the assumption of the trial Court and of the prosecutor.

When, therefore, Judge Fuld holds it to be "a matter of ineluctable logic" that the Meenahan and District Attorney confessions "must also be deemed to have been induced by that promise, and likewise inadmissible", he substitutes a syllogism for a fact. The key to the entire question of inducement lay in the determination of these questions of fact: Was there a promise of immunity, and if there was, did petitioner make the subsequent confessions in reliance thereon; or did he make them voluntarily and uninfluenced by the promise of immunity? These ques-

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tions, in turn, were dependent upon the prior resolution of the further question raised by petitioner's claim of unconsciousness for several days following the Helfand contact: did petitioner consciously make a confession at all? That these were questions of fact to be resolved by the jury cannot be denied (*People* v. *Leyra, supra; Lee* v. *Mississippi,* 332 U. S. 742, 92 L. Ed. 330). Nor can it be doubted that the jury had these questions of fact submitted to them by the trial Court in a manner more favorable to the petitioner than he was entitled to. Dye, *J.*, speaking for the majority of the State Court of Appeals, says:

> "According to the record now before us, the Helfand confession was again received in evidence 'merely on the question as to whether or not whatever statements the defendant made * * * were inspired' by Dr. Helfand, an issue raised by defense counsel. This was received after the trial court had cautioned counsel at length, followed by a most explicit and detailed instruction to the jury as to its illegality phrased in most simple and understandable language that they might not consider it on the issue of guilt under 'any circumstances', but were limited to a consideration of its effect on the later confessions, and that these two were to be entirely disregarded if found to be dependent upon it in any respect whatsoever, a distinction which each individual juror signified that he understood. The Trial Judge did not stop there but dealt with it in his main charge and we believe fully and adequately by pointing out again and again that as a matter of law the confession made to Dr. Helfand was not to be considered on the issue of guilt. Moreover, he was careful to instruct the jury as to the defendant's contention leaving them to say with what force and effect the 'coercion and promise * * * did

in fact carry over and into each of the subsequent confessions' at the same time giving like instructions as to the People's contention, leaving it for the jury to say whether the later confessions made to other persons 'were entirely voluntary and not induced by any promise of leniency.'

"In this manner and by this means the defendant's statement to Dr. Helfand was effectively insulated from the jury for consideration on the issue of guilt and was made available to them for the sole and limited purpose of saying whether or not the later statements made to others were dependent in any way on coercion or inducement, coupled with the clear and positive instruction that if so found to be, it was 'worthless as evidence'. Such submission for separate consideration was in obedience to our specific ruling at the prior trial.

"When the Trial Judge charged that as a matter of law a promise of leniency had been made by Dr. Helfand, he did not thereby make that statement 'the law of the case' to such an extent as to deprive the jury of the benefit of his instruction as to 'carry over and inducement'. That was the precise issue they were required to pass upon. The 'law of the case' governing the jurors in their deliberations is to be found in the charge in its entirety and is not to be taken from a ruling concerning the limited nature and effect of a single item of evidence, particularly, when the point said to be prejudicial, as here, has been specifically excluded. The law governing the retrial of this case was explicitly laid down by us at the prior trial which was that the statement to Dr. Helfand was coerced and worthless as evidence. The circumstance that the Trial Judge also said it was worthless, because a promise had been made as a matter of law, did not in any

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> way prejudice the defendant. It was, if anything, to his advantage."

It has thus been plainly demonstrated that of the six Judges who in the State Court of Appeals participated in the second decision of the case, all, including the dissenting Judges, either directly or by failing on this point to dissent from the majority, held it to have been proper for the trial Court, *on the issue of coercion* to submit to the jury as a question of fact the voluntariness of the official confessions (Froessel, *J.* concurred in the affirmance under the provisions of Code Crim. Pro. Sec. 542). This was a decision that on the issue of coercion, the subsequent confessions were valid under the provisions of both New York State Constitution, Article 1, Sec. 6:

> "No person shall be deprived of life, liberty or property without due process of law,"

and Code Criminal Procedure, Section 395:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Since there is no legal basis in either State or Federal law for the distinction between "mental coercion" and promise of immunity as made by the dissenting minority of the State Court, then the submission of both questions of fact to the jury should control in the second, as in the first, element.

Petitioner nevertheless contends in this Court that the reception of the subsequent official confessions worked a violation of his rights to due process under the Fourteenth Amendment of the Federal Constitution because

(1) the statement to Helfand was obtained by means of mental coercion and promise of immunity, and (2) by reason of both elements of coercion and promise and because of the alleged limited time factor between the antecedent statement and the subsequent confessions, the persistence of influence was proved as a matter of law and not disproved as a question of fact.

We turn to the governing law as settled adversely to petitioner by this Court.

In this, the nub of the entire case, in its Federal constitutional aspect, we place firm reliance for the legality of petitioner's conviction on the cases of *Lisenba* v. *California,* 314 U. S. 219, 86 L. Ed. 166; *Lyons* v. *Oklahoma,* 322 U. S. 596, 88 L. Ed. 1481 and *Stroble* v. *California,* 343 U. S. 181, 96 L. Ed. 872, re-hearing denied 343 U. S. 951, 96 L. Ed. 1353.

In *Lisenba,* defendant, arrested on the morning of Sunday, April 19th, was taken to the District Attorney's office and several hours thereafter was questioned concerning an incest charge not involved in the murder. During the night he was questioned by officers in relays, remaining fully dressed and without sleep. After breakfast on Monday, he was questioned again until 3 o'clock Tuesday morning (when, according to him, he fainted, but according to others, he slept). On Wednesday after breakfast, he was placed under arrest, arraigned before a Magistrate,

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and committed on the incest charge. During this period of April 19-21, he made no admission or confession of incriminating nature although he claimed (with some proof) to have been beaten.

On May 1st his accomplice in the murder was arrested and made a statement. On May 2nd defendant was confronted with the accomplice, but again refused to make a statement. He was questioned again, but it was only at midnight that he confessed, after having said to a Deputy Sheriff: "Why can't we go out and get something to eat; if we do, I'll tell you the story." Defendant later repudiated the confession, claiming it to have been merely an attempt on his part to re-tell the tale which the accomplice had told and "which had been constantly dinned into his ears". There were, however, discrepancies in the two stories.

In accordance with California practice (identical with that of New York), a preliminary *voir dire* was held at the trial and the confession of May 2nd was admitted in evidence. The Court charged the jury "that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducement, promises, threats, violence, or any form of coercion."

When the case came to this Court, there was a finding that there had been an illegal and criminal violation of the California statute requiring prompt arraignment. It was also determined that Lisenba had been denied an opportunity to consult counsel and that there was impropriety in taking him from the jail to the District Attorney's office for questioning. Nevertheless, this Court limited the issue to the voluntary or involuntary character

of the confession elicited from the defendant, these other circumstances being only items to be appraised in the determination of the basic problem, *i.e.*, whether the evidentiary use of the confession was a denial of due process. In sustaining the conviction this Court wrote:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> "Here judge and jury passed on the question whether the petitioner's confession was freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty then is to determine whether the evidence requires that we set aside the finding of two courts and a jury and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.
>
> "In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far

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as concerns the petitioner's claim of physical violence, threats *or implied promises* of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later confessions had been forthcoming we should have no hesitation in overruling his contention respecting the admission of his confessions.

"Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? *If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.* There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded." (Italics ours.)

So, here, the prior Helfand questioning does not "render the use of the confessions a violation of due process."

Lyons v. *Oklahoma, supra,* supports even more strongly than does *Lisenba,* the instant judgment. There is a com-

plete parallelism in the facts of the two cases,—a parallelism disclosed by Mr. Justice Reed's statement:

> "This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary, the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, *particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.*" (Italics ours.)

In *Lyons*, petitioner was interrogated immediately after his arrest and for about two hours. Eleven days later he was again questioned in the prosecutor's office from about 6 o'clock in the afternoon until between 2:00 and 4:00 o'clock in the morning. He then confessed. He was taken to the State penitentiary the same day, and there made a second confession. Two days later he made a third confession to a penitentiary guard. He was without counsel until after all the confessions had been given.

Testimony in his behalf, of physical abuse prior to his first interrogation as well as threats of further harm unless he confessed, was denied. Evidence of abuse with respect to the second and third confessions was likewise denied by the alleged perpetrators. In addition, defendant was admittedly subjected to a view of a pan of the victim's bones placed in his lap prior to the first confession. Of this episode (clearly mentally coercive and thus similar to the Helfand contact) this Court said:

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> "As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary."

The second confession—the one first given at the penitentiary—was objected to on the ground that "force was practiced to secure it and that even if no force was then practiced, the fear instilled by prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession." This confession was received in evidence only after a proper preliminary *voir dire* and instructions favorable to the defendant that such confessions should be "carefully scrutinized and received with great caution."

This Court sustained the judgment of conviction and in so doing announced certain principles which we submit conclusively sustain the validity of the judgment now under review:

(1) Neither common law nor constitutional due process prohibits the questioning of a suspect while in custody of police officers;

(2) *It is a matter for state courts to determine the wording of instructions upon the involuntary character of a confession and if such instructions fairly raise the question, the requirements of due process are satisfied;*

(3) While the Supreme Court is under the duty of examining into the evidence as to the voluntary or involuntary nature of the confession "no formula to determine this question by its application to the facts of a given case can be devised".

(4) Where an improperly obtained confession is not used at a trial but one later made is, then:

> "The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practice which may fairly be drawn from the surrounding circumstances."

(5) In amplification of this last mentioned principle, the Court wrote:

> "The Fourteenth Amendment does not protect one who had admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. *If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process.*" (Italics ours.)

In *Lyons* as here, petitioner made the argument as to closeness of time and carry over. This Court thus answered:

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"Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that in this case there is evidence for the state, which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester.*

We advert now to *Stroble* v. *California, supra,* as authority most cogent in nature for the affirmance of the instant judgment. The principle of decision is identical with that

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* In the case now before the Court, the credible evidence which makes it "abundantly clear" that the Helfand contact did not induce the subsequent official confessions is the confession to Herrschaft. If the confession to Meenahan had been coerced and involuntary, petitioner would have availed himself of this opportunity to complain of it to his friend and business partner. The strikingly contrary act of, instead, confessing permits us to say with the Court of Appeals (*People* v. *Borowsky*, 258 N. Y. 371):

> "A jury might reasonably find that he yielded not to fear of violence, but to a conviction that denial of guilt was hopeless when his confederates had turned against him."

There is further evidence in the record giving reason for petitioner's ultimate confessions to Meenahan and the District Attorney. We have seen that on the evening of Thursday, January 12, Petitioner had learned from Meenahan that the falsity of his New Jersey alibi and his lies about the purchase of a suit of clothing and shoes were known to the police and that he then began to disclose the hostility between himself and his father and also for the first time to admit his presence in the parents' apartment on the murder morning. In this context, the language of Mr. Justice Jackson in *United States* v. *Bayer*, 331 U. S. 531, 540 is of interest:

> "Of course, after an accused has once let the cat out of the bag by confession, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a useable one after those conditions have been removed.

of *Lyons* v. *Oklahoma, supra.* It is the time factor which makes it completely applicable to, and indeed prophetic of, the instant case.

Stroble was arrested at Noon of November 17, 1949 for the murder of a six year old girl who had been most brutally killed in the perpetration of a sexual abuse. He was kicked by the arresting officer, who also threatened him with the use of a blackjack. A civilian standing nearby asked defendant if he was guilty and defendant "mumbled something under his breath that sounded like 'I guess I am' " whereupon he was again slapped and his eye glasses knocked off. Defendant, while being taken to the District Attorney's office, admitted the killing in more descriptive and definite terms. There was no objection to this confession at the trial, but objection was made to a confession to the District Attorney about one hour after defendant's arrest and after the violence practiced upon him when arrested. (The District Attorney's interrogation continued for about two hours during which time defendant had no counsel.)

This Court held that the charge of the trial Court with regard to confession was proper. That charge did not in the least differ from the charge in the instant case. Moreover, the record in *Leyra* is in the important point of "carry over" of coercive effect identical with the record in *Stroble*. Certainly the contention is the same:

> "Petitioner does not so much as suggest that the action of any officer during the taking of the confession was accompanied by force or threats. His sole contention is that the incidents in the park foreman's office, coupled with the presence of nine-

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teen officers in the district attorney's office, rendered the confession which he made in the latter office involuntary."

The Court rejected the contention saying:

"This Court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the undisputed facts. Malinski v. New York, supra (324 U. S. at 494, 89 L. Ed. 1032, 65 S. Ct. 781) and cases cited; id., at 438, 89 L. Ed. 1050 (dissenting opinion). We adhere to that rule. In the present case, however, we need not confine ourselves to the undisputed facts; for, even if we give petitioner the benefit of every doubt as to the alleged coercion, we do not think it can fairly be said that his confession in the District Attorney's office was coercion's product. *Whatever occurred in the park foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise his statement to the officer while on the way to the District Attorney's office was admittedly voluntary.** In the District Attorney's office, petitioner answered questions readily; there was none of the 'pressure of unrelenting interrogation' which this Court condemned in Watts v. Indiana, 338 U. S. 49, 54, 93 L. Ed. 1801, 1806, 69 S. Ct. 1347 (1949). Indeed, the record shows that from the time of his arrest until the time of his trial, petitioner was anxious to confess to anybody who would listen and as much

* *Cf.* Confession to Herrschaft and distinction made by Fuld *J.* between this confession and the Meenahan and District Attorney confessions.

> so after he had consulted with counsel as before. His willingness to confess to the doctors who examined him, after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that petitioner had concluded, quite independently of any duress by the police, 'that it was wise to make a clean best of his guilt.' See Lyons v. Oklahoma, supra (322 U. S. at 604, 88 L. Ed. 1487, 64 S. Ct. 1208). In the light of all these circumstances, we are unable to say that petitioner's confession in the District Attorney's office was the result of coercion, either physical or psychological." (Italics ours.)

We submit with confidence that the trial in the State Court followed the course charted by this Court and consistently adhered to by it in every case where the issue of subsequent confessions has been considered. In its real essence, petitioner's entire case here rests upon the bare assertion that in the judgment of his protagonists, a standard of time arbitrarily assumed on his behalf is of greater factual validity (and of consequent greater legal merit), than the findings of fact by the trial jury and the affirmance thereof by the State Court of Appeals; and greater in both respects than the determination, with specific reference to constitutionality, by the United States District Court and the United States Court of Appeals (both of which tribunals were concerned with factual questions identical with those in the State Courts). A conclusive and contrary answer is found in the last expression of this Court on the subject in *Stein* v. *New York*, 346 U. S. 156, 97 L. Ed.:

> "Since these convictions may rest in whole or in part upon the confessions, we must consider whether

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they are a constitutionally permissible foundation for a finding of guilt.

Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to 'that fundamental fairness essential to the very concept of justice?' Lisenba v. California, 314 U. S. 219, 236, 86 L. Ed. 166, 179, 62 S. Ct. 280. The first is identical with that litigated before the trial court and jury. The second is within, if not identical with, those questions considered by the State Appellate Court. As to both questions, we have the identical evidence that was before both State Courts. At the threshold of re-inquiry, therefore, lies the question: What, if any, weight do we give to the verdict of the jury, the rulings of the trial judge and the determination of the State Appellate Court?

Petitioner's argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by re-weighing the same evidence we, as a superjury, should find that the confessions were coerced. *This misapprehends our function and scope of review,* a misconception which may be shared by some State Courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.

Of course, this Court cannot allow itself to be completely bound by State Court determination of any issue essential to decision of a claim of Federal right, else Federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some State Appellate Courts, such as the New

York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 A. L. R. 892. *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen under an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of Federal Constitution, the weight of conflicting evidence to support a decision by a State Court.*

It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. *Primarily, and in most cases finally, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.*

A jury and the Trial Judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried* and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the State's own decision great, and in the absence of impeachment by conceded facts, decisive respect." (Italics ours.)

Here, the jury and the State Court of Appeals found a complete absence of "carry-over" which was as much a question of fact as any other fact in the case.

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That these same standards of judgment which this Court imposes upon itself are likewise binding upon the District Court and the United States Court of Appeals cannot be doubted. While the State Court adjudications of fact are not *res adjudicata* (*Brown* v. *Allen, supra*), nevertheless not

> "unless special circumstances prevail should the lowest Federal Court reverse the highest State Court in cases where the constitutional issues have been disposed on the merits by the highest State Court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the State Court and the allegations in the petition for the writ before the Federal Court fail to disclose that the State in its prosecution departed from the constitutional requirements. That is this case." *United States ex rel. Smith* v. *Baldi*, 96 F. Sup. 100 at 103 quoted with approval by this Court in *U. S. ex rel. Smith* v. *Baldi*, 344 U. S. 561, 569, 73 S. Ct. 391, 437, 97 L. Ed. 549, 557.

Petitioner departs from his original strong challenge to the Meenahan and District Attorney confessions when (his brief, p. 17) he argues that "at the very least the statements to Capt. Meenahan should have been excluded" on the ground, as erroneously claimed, that "there was no evidence from which a jury could find beyond a reasonable doubt that the promise of leniency made by Dr. Helfand did not carry over • • • ".

Petitioner thereby in effect concedes the freedom from taint and inducement of the latest—District Attorney—confession, and, having so conceded, admits the validity of the ultimate judgment of guilt. This Court has so decided in *Stein* v. *New York, supra.*

In *Stein*, this Court's review of the record and charge in the State Court left the Court in doubt whether the jury had accepted the voluntariness of the confessions as a fact and convicted in reliance thereon, or whether the jury had rejected the confessions and convicted on other evidence. Translated in terms of the facts of the instant case, petitioner urges that since it cannot be known whether the jury convicted on the basis of the Meenahan confession *and* the District Attorney confession, or whether the jury convicted on the basis of the District Attorney confession alone, therefore even the voluntary District Attorney confession is not sufficient to sustain the judgment in view of the tainted and preceding Meenahan confession. But *Stein* v. *New York*, holds to the exact contrary:

> "But this does not exhaust petitioner's arsenal of objections. They argue that even if the jury were permitted to find the verdict, a reviewing Court must set it aside. They say that affirmance without opinion may mean that, while the Court of Appeals thought the treatment of the confessions erroneous, it may have affirmed on the basis that, in view of other sufficient evidence, the error was harmless. The New York statute, like the Federal rules of criminal procedure, commands reviewing courts to disregard errors and irregularities which do not affect substantial rights. That such a general legislative mandate is constitutional is not in question. If the general rule is not prohibited, the question in each case becomes one as to the propriety of its application to the evidence. In a trial such as this, lasting seven weeks, where objections by three defense counsel required in excess of three hundred rulings by the trial court without the long deliberation and debate possible for appellate court con-

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sideration, it would be a miracle if there were not some questions on which an appellate court would rule otherwise than did the trial judge. The harmless-error statutes have been adopted to give discretion to overlook errors which cannot be seen to do injustice.

But, whatever may have been the grounds of the Court of Appeals, we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error. We have pointed out that it was not error if the jury admitted and relied on the confession and was not error if they rejected it and convicted on other evidence. To say that although there was no error in the trial an appellate court must reverse would require justification by more authority than we are able to discover.'' (Italics ours.)

In sum, it is our submission that the jury correctly found that petitioner confessed to Meenahan and the District Attorney of his own volition and without the compulsion of coercion or the inducement of promise. We make no concession to the contrary concerning the Meenahan confession; but even if this Court should by possibility find that the Meenahan confession was inadmissible by reason of either coercion or promise, then, despite this and under the authority of *Stein* v. *New York*, the conviction is legally warranted by the jury's acceptance of the ultimate District Attorney confession, free from either invalidity factor of coercion or promise.

• • • • •

Petitioner levels two charges against the Court below which he seeks to clothe with the garb of constitutionality, but which actually are no more than misapplied questions

of procedure. He claims, first, that the Court erred in disregarding the State trial court's charge to the jury that a promise of immunity existed as a matter of law and erred, again, in holding that the State Court of Appeals had rejected the trial court's ruling. It is our submission that petitioner himself errs in both these claims.

We have seen that Froessel, *J.*, writing for the entire Court in the unanimous reversal of the first judgment of conviction, treated the existence of inducement by promise as being nothing more than a question of fact to be accepted or rejected by the jury on the second trial. We have also seen that Dye, *J.*, writing for the majority of the Court after the second conviction, did not so much reject the trial Court's charge as limit it. That limitation was that the the trial Court's reference to a promise of immunity was an additional benefit, since

> "the law governing the retrial of this case was explicitly laid down by us at the prior trial which was that the statement to Dr. Helfand was coerced and worthless as evidence. The circumstance that the Trial Judge also said it was worthless, because a promise had been made as a matter of law, did not in any way prejudice the defendant. It was, if anything, to his advantage."

The Court below correctly adopted this reasoning on the theory that it is the total trial charge which constitutes the law of a case and not any isolated statement, and further upon the theory that, viewed *in toto*, the charge "while excluding the Helfand confession quite completely, nevertheless specifically allowed the jury to pass on the validity of the other confessions from the standpoint of

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both coercion and inducement." That Court also acutely pointed out, as did Judge Dye, that the additional statements by the Trial Judge, unwarranted as they were by the evidence, nevertheless were not to the prejudice of the petitioner, but to his advantage.

We see no reasonable basis for cavil with this construction. The net effect of the Trial Judge's unauthorized charge—unauthorized by the evidence in the case and by the prior instructions of the State Court of Appeals—was to add to the People's burden an element which the law did not require. That the jury nevertheless convicted petitioner simply proves the enormous weight of the evidence against him and the adequacy of its strength to carry this additional burden.

This Court has ruled in *Lyons* v. *Oklahoma, supra,* that it is within the province of the State Appellate Court to determine the wording of instructions upon the involuntary character of a confession and that if such instructions fairly raise the question, the requirements of due process are satisfied. From this constitutional point of view, therefore, New York has said the last word on the subject of the wording of the Trial Judge's charge: *i.e.,* that the charge fairly raised the constitutional question—fairly as regards the rights of this petitioner. It gave him all to which he was entitled under the actual evidence and more because, as the Court of Appeals said:

> "But even if the reason can be raised to the dignity of the ruling itself, it went beyond the actual evidence in depicting a specific and clear cut promise. The complete record of the doctor's entire performance shows no clear differentiation between threats and inducement and nowhere a specific and definite

> promise of a lesser charge as the reason for confession. True, the doctor's offensive activities produced certain statements of convenient vagueness from which a person of some sophistication in the law could have drawn that conclusion. Actually the accused never indicated in any way that he did make such an admission, either in his response to the doctor's advances or in the testimony which he gave at the first trial."

And, finally, even if it be conceded *arguendo* that the Court below in its formal opinion gave the wrong reason for a correct result, that becomes, under the law enunciated by this Court, completely immaterial. In *Brown* v. *Allen*, *supra*, the District Court in dismissing a writ of habeas corpus sued out after State Court judgments of Murder in the First Degree, erroneously concluded that the denial of certiorari by this Court had evidentiary value in the habeas corpus proceedings. This was held to be an irrelevant circumstance. The Court wrote:

> "Furthermore, in view of the consideration that was given by the District Court to our denial of certiorari in these cases, should we return them to that Court for re-examination in the light of this Court's ruling upon the effect to be given to the denial? We think no. From the findings of fact and the judgments of the District Court we cannot see that such consideration as was given by that Court to our denials of certiorari could have had any effect on its conclusions as to whether the respective defendants had been denied Federal constitutional protection. It is true, under the Court's ruling today, that the District Court in each of the three cases erroneously gave consideration to our denial of certiorari. *It is also true that its rulings, set out*

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above, show that without that consideration, it found from its examination of the State records and new evidence presented that the conduct of the respective State proceedings was in full accord with due process. Such conclusions make immaterial the fact that the trial court gave consideration to our denial of certiorari.

The District Court and the Court of Appeals recognized the power of the District Court to re-examine Federal constitutional issues even after trial and review by a State and refusal on certiorari in this Court. Darr v. Burford, 339 U. S. at 214. The intimation to the contrary in the Speller case, 99 F. Supp. at 95, see p. 486, supra, must be read as the court's opinion after the hearing. *'In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason'.* Certainly the consideration given by the District Court to our former refusals of certiorari on the issues presented cannot affect its determinations that there was no merit in any of the applications for habeas corpus, 98 F. Supp. 868, 870; 99 F. Supp. 97, 99; 99 F. Supp. at 216. Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials. *Whether we affirm or reverse in these cases, therefore, does not depend upon the trial court's consideration of our denial of certiorari but upon the soundness of its decisions upon the issues of alleged violation of Federal procedural requirements or of petitioner's constitutional rights by the North Carolina proceedings."* (Italics ours.)

In its search for the truth as regards the issue of voluntariness or involuntariness, this Court, we submit, will disregard form and consider only substance. In that respect every Court which has scrutinized the record of the second trial has found ample evidence to justify their conclusions that petitioner confessed to Meenahan and the District Attorney voluntarily, without compulsion and without inducement. Petitioner's brief magnifies this single development in the history of the case out of all proportion to its importance. The great principles of constitutional law codified in the Fourteenth Amendment are minimized indeed by an argument notable only for its sophistry.

* * * * *

Petitioner's last contention is a *decrescendo* of argument. It is that the Court below misestimated the value of the conflicting evidence given by Doctors Bellinger and Murphy. The argument runs in this form: "Moreover, absent lay testimony which creates an issue for jury consideration, mere conflict by experts cannot create any such issue. For expert testimony has significance only in relation to non-expert testimony. Unless the latter creates an issue for consideration by the trier of the facts there is no place in the case for the expert."

The argument finds no basis either in law or in fact. The New York cases cited, *Matter of Stern*, 235 App. Div. 60; *Strasberg* v. *Equitable Life Ass. Soc.*, 281 App. Div. 9, hold only that expert opinion which is contrary to the weight of evidence must fall.

> "Whatever may be ordinarily thought of the worth of a medical opinion, where it is contradicted by the facts, the facts must prevail." *Strasberg* v. *Equitable Life Ass. Soc., supra.*

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Petitioner's dictum is an attempt to strike from the record the large volume of testimony which formed the basis for the experts' conclusions.

Thus, before they testified, Dr. Helfand was called on the *voir dire* (749 *seq.*) and was examined and cross-examined. In the cross-examination particularly, his procedures with respect to petitioner were detailed to the jury. Dr. Bellinger was in the Courtroom during this part of the trial, heard the testimony, and on that basis, expressed his opinion that the mental coercion carried over "to any subsequent time" (866). (In addition, Dr. Bellinger examined petitioner at the Raymond Street jail (1959) during the course of the trial.) There was then posed for him a hypothetical question which included every possible item of petitioner's experience from the time he was first questioned on January 10, 1950 (1960-2027) through the time when he made the last statement to the Assistant District Attorneys. Particular reference was made to Helfand's practices upon him. In answer to this hypothetical question, the evidentiary fullness of which cannot be questioned, Dr. Bellinger testified that in his opinion the mental coercion continued over into the statements made to Meenahan, Herrschaft and the Assistant District Attorneys. In further direct and cross-examination (2086-2091) he also made the definite assertion based upon the Helfand episode "we will help you" etc., that this which Bellinger considered to be a promise, carried over into the subsequent confession.

The same course of procedure was followed with respect to Dr. Murphy as a People's witness. He too had heard Helfand's testimony (890) and also first used that testimony as a basis for his conclusion that the mental coer-

cion inherent in Helfand's practices did not carry over into the subsequent confessions. He was in Court during the time when the hypothetical question was propounded to Dr. Bellinger, heard it and remembered it (2075). On the basis of this same evidence-full question, he expressed his contrary opinion (2080 *seq.*). He gave the same opinion concerning promises made by Helfand (2094-2096); *i.e.*, that such promises, if existing, did not thus carry over. He disposed of the issue of suggestability under a long examination (2188-2250), testifying that the items of information given by the petitioner in his later confessions came from the reservoir of his own mind.

In a word, Dr. Bellinger and Dr. Murphy both expressed opinions which were not formed arbitrarily on the basis of mere theory but which related to, *and were founded upon*, a complete knowledge on the part of each of the Helfand episode in full detail. This is far from constituting the "absence" of lay testimony of which petitioner complains. On the contrary, it is lay testimony of the fullest sort because, in addition to being a detailed and undisputed description of the Helfand practices, it bore the Court *imprimatur* as to coercion, and as to promise, it had the added weight that the wording of such promise was not in dispute even though the extent of its meaning and implication was a question for the jury.

IN CONCLUSION

We respectfully submit:

Petitioner was accorded a fair trial. The confessions to Meenahan, Herrschaft and the District Attorney were freely and voluntarily made without influence in the mak-

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ing thereof by carry-over of the Helfand "mental coercion" or promise of immunity. The issue of voluntary or involuntary confession was properly submitted to the jury under instructions which more than met every requirement of law. The Courts below correctly analyzed the evidence from the constitutional point of view of due process and properly disposed of the petition for a writ of *habeas corpus* by denial thereof.

POINT II

The order of the Court of Appeals should be affirmed.

Dated: Brooklyn, New York,
April, 1954.

Respectfully submitted,

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